United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7336

United States Court of Appeals

For the Second Circuit

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Docket No. 76-7336

JACOBSON & COMPANY, INC.,
Plaintiff-Appellee,

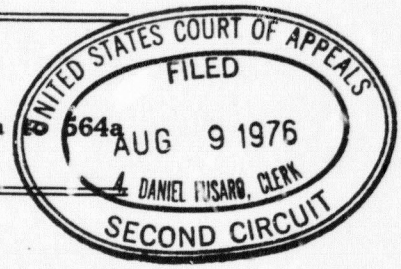
against

ARMSTRONG CORK COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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DONOVAN LEISURE NEWTON & IRVINE
Attorneys for Defendant-Appellant
30 Rockefeller Plaza
New York, New York 10020
(212) 489-4100

MOSES & SINGER
Attorneys for Plaintiff-Appellee
51 West 51st Street
New York, New York 10019
(212) 581-9000

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACOBSON & COMPANY, INC.,

Plaintiff,

- against -

ARMSTRONG CORK COMPANY,

Defendant.

76 Civ. No. 2367 (EW)

AFFIDAVIT

- x

COMMONWEALTH OF PENNSYLVANIA)
: SS.:
COUNTY OF LANCASTER)

PHILLIP W. UNGER, being duly sworn, deposes and says:

1. I am General Sales Manager of the Architectural Ceiling Systems Division of defendant Armstrong Cork Company ("Armstrong"). I submit this affidavit in opposition to plaintiff's motion for a preliminary injunction.

2. At the outset, I want to make the record clear with regard to certain Armstrong ceilings sales policies. First, it is Armstrong's policy to designate certain contractors as Armstrong ceilings distributors, as opposed to selling its ceiling line to any contractor who might request those products. The reason Armstrong does not sell to every contractor who might want to place an order is that Armstrong is interested in having its ceilings, as installed, meet all performance and aesthetic criteria as advertised by Armstrong. In addition, the contractor will be assisting us in promoting our products. In light of this, it is necessary for Armstrong to not only offer technical training, but to develop a close relationship with and have confidence in the contractor-distributors who purchase Armstrong ceilings products

and who then undertake promotion of our products and the often complex task of converting the Armstrong product specifications into installed ceilings.

3. It is also Armstrong's policy to establish ceilings contractors to cover certain territories as areas of primary responsibility for its various products. In doing this, Armstrong attempts to create a balance which will provide Armstrong both with adequate representation and yet maintain only the number of distributor-contractors necessary to permit the kind of close working relationship which I described above. For this reason, Armstrong is not likely to appoint an additional distributor in an area if the existing representation in the area is clearly meeting its hopes and expectations.

4. While Armstrong's needs can be met in certain areas of the country by a single ceilings contractor-distributor, it is almost always desirable to appoint several contractor-distributors in an area. In either event, it is not Armstrong's policy to require that any contractor-distributor buy its ceiling products only from Armstrong or that it buy those products from Armstrong except where a competitor's product is demonstrably superior, and most do not. It is Armstrong's hope, of course, that a contractor-distributor will purchase sufficient acoustical ceilings volume to make the relationship a desirable one from Armstrong's viewpoint.

5. I am informed that Jacobson & Co. requested an Armstrong ceilings contractor-distributorship in March, 1968 (prior to my assuming my present responsibilities on January 1, 1972). Among other things, Jacobson asked to be the sole designated contractor-distributor in the Long Island and the Westchester-Rockland-Fairfield Counties areas and to be a second

Armstrong contractor-distributor in New York City and Northern New Jersey. (Exhibit A). On March 28, 1968 Mr. J. M. Goodwillie of Armstrong granted some of these Jacobson requests, stating that Armstrong would expect to be Jacobson's "sole major supplier" in the Long Island area. (Exhibit B) I in no way understand this to mean that Jacobson could not buy competitive ceilings products for use in Long Island and, in fact, Jacobson subsequently utilized substantial amounts of competitive products in the area. The fact is, however, that Long Island is a significant area of business for Armstrong ceilings; and Armstrong will not designate a single contractor-distributor in such an area without some reason to believe that the contractor-distributor will provide it with adequate representation. Jacobson did not provide Armstrong with adequate representation on Long Island, with the result that Armstrong appointed Island Acoustics as an additional ceilings contractor-distributor in the area in 1973.

6. With regard to the five counties of New York City and Westchester and Fairfield Counties, Mr. J. M. Goodwillie wrote to Jacobson on March 28, 1968 that "we would expect to replace product lines where we could supply equal or superior products." A similar statement was made with respect to Northern New Jersey and Rockland County. On the basis of my long term understanding of Armstrong's sales policies, this was in no way intended to preclude Jacobson from purchasing competitive products, and in any event, Jacobson subsequently: (a) retained all of its pre-existing competing product lines; and (b) continued to sell substantial quantities of competitive products which, in our view, were either no better than or were inferior to Armstrong products. Thus, I am sure that Mr. Goodwillie's statement, which was quoted above, was simply an attempt to say that Armstrong hoped and expected that Jacobson would do enough New York City and other

business with Armstrong ceilings to make the relationship a desirable one from Armstrong's viewpoint.

7. For reasons which are previously set forth, Armstrong designates ceilings contractor-distributors to cover areas of primary responsibility and encourages its contractor-distributors to provide Armstrong with effective representation within their respective areas. At the same time, however, it is Armstrong's strong policy to in no way inhibit, preclude or render it impractical for a contractor-distributor to bid on jobs outside his own primary territory. In fact, it is very common practice for Armstrong ceilings contractor-distributors throughout the country to bid on such jobs and, as a demonstration of this, I attach as Exhibit C a list of some recent instances which immediately come to mind. This in no way represents all contractor-distributors engaged in this activity, nor are all applicable jobs listed.

8. Beginning in 1968, Jacobson took the position that it wanted Armstrong to designate it as a ceilings contractor-distributor in the Philadelphia area. Armstrong declined to do this for the reason that it already had full and excellent representation in the area. This decision was in all respects consistent with Armstrong's policy, as set forth above.

9. Armstrong has also at all times acted in accordance with the policies set forth above in connection with Jacobson's bidding on ceilings jobs outside its areas of primary responsibility and has taken no steps to render it impractical or undesirable for it to do so. Armstrong's position in this regard as of early 1971 is clearly set forth in documents (Exhibit D) such as the one identified below:

February 3, 1971 letter from Mr. J. O. Sampson of Armstrong's Building Products Division to Mr. John D. Jacobson, President of Jacobson & Company, Inc.:

> "Following through on our telephone conversation of last week, I again discussed with Jake Snyder our situation in the Philadelphia market."
>
> "Jake is distressed, as I am, that you had been led to believe that his office would be prepared to work closely with your Philadelphia branch starting in 1971. If you gained this impression from me, I can only apologize for misleading you. You did point out last summer that it would be impractical to carry two manufacturer's stocks at Elizabeth, and that you would be shipping Armstrong material for remodel jobs into the Philadelphia market."
>
> "We agreed that it would not be practical to service all of your jobs from Elizabeth and that you would need factory shipments to job sites to operate efficiently. . . ."
>
> "Jake recognizes your problems with a centralized warehouse at Elizabeth and your right to order Armstrong material for shipment into his territory when this is to your advantage. . . ."
>
> ". . . Jake's position is that you have the right to promote and sell Armstrong materials in the Philadelphia market if you elect to, but he doesn't feel that he should encourage this through his office."
>
> "In developing this business, we have always felt that our district managers must be given the right to establish the distribution that they feel is best for their own territory. . . ."

10. As can be seen from the foregoing, Armstrong followed its policy in dealing with Jacobson of respecting a contractor-distributor's right to sell Armstrong ceiling products outside its areas of primary responsibility. One problem that Armstrong occasionally incurs in following this policy, however, is how to provide a contractor-distributor bidding outside its usual area with support which is substantially similar to that which it has grown to expect from its local regional office while

bidding within its primary area. Armstrong's practice in this regard is as follows: A contractor-distributor bidding outside its designated area is asked to operate through the regional office nearest its home location in connection with the transaction of that business as much as possible. The reason for this is that these local regional offices are set up to deal with certain contractor-distributors, and numerous administrative, logistical, and staffing problems are created for a regional office to deal with relatively unfamiliar contractor-distributors from outside the region that are involved in a specific local job. Thus, a contractor-distributor that is bidding outside its primary area is asked to obtain preliminary information, such as price quotations, through the regional office nearest its home location. If it decides to bid, the regional office in the area in which it is bidding in no way encourages the general contractor to accept the bid made by the local Armstrong contractor-distributor, as opposed to the "outside" bid. If the "outside" bidder is awarded the contract, it places its order for Armstrong materials through the regional office nearest its home location, which gets credit for half the sale. The regional office where the job is located gets credit for the other half. It is important to note that all Armstrong contractor-distributors are furnished the price lists, literature and technical brochures, which are necessary to bid Armstrong ceiling specifications on projects. If special pricing is required, this pricing is administered by the home office in Lancaster and not by the regional office. It is therefore as easy for an "outside" bidder to secure prices as it is for the local bidder to do so.

11. Once an Armstrong contractor-distributor starts installation work on a job, the primary service provided by the regional office is to expedite delivery and to deal with on-site

complaints concerning Armstrong ceiling products. When a contractor-distributor is undertaking a job outside its local area, we ask it to consult with the regional office nearest its home location regarding delivery problems since that is the office through which the contractor-distributor placed its order. With regard to on-site complaints regarding Armstrong ceiling products, however, there is no predetermined policy as to whether Armstrong support for a contractor-distributor operating outside its area will come from the regional office nearest its home location or from the regional office in which the work is being done. As a general rule, we prefer to have personnel from the regional office nearest the contractor-distributor's home location deal with such matters. On some occasions, however, it simply makes no sense, for example, to send men from the Northeastern regional office to deal with a complaint in the Mid-Atlantic region. In such instances, the regional office where the work is being done is asked to handle the matter on behalf of the "outside" contractor-distributor. While it might be slightly inconvenient for a contractor-distributor operating outside its local area sometimes not to have the continuous convenience of a "local" Armstrong representative where the work is being done, the fact is that any such inconvenience is minor and in no way places the contractor-distributor at a competitive disadvantage.

12. The procedures outlined above are the procedures that Armstrong has at all times tried to observe in providing support to Jacobson on ceilings jobs in the Mid-Atlantic area. On January 17, 1972, however, Mr. Jacobson wrote to Mr. J. H. Binns, the President of Armstrong, complaining that his firm had not received adequate support from Armstrong in connection with

a ceilings job his firm had wanted to bid and stating that "we were unable to bid the job on the basis of Armstrong." Since Mr. Binns received this letter shortly after I took over my present responsibilities, he referred it to me for investigation and reply. I took the complaint very seriously, and in the course of responding, stated as follows:

> "We certainly respect and encourage your right to sell whomever and wherever you desire. However, we staff our regional office with enough personnel to service contractors located in that area. Dick Wiley, Joe McGinty, Dave Domber and Bob Baram will continue to render whatever assistance your operations may require. Our Philadelphia personnel will do the same thing for our contractors there. . . ."
>
> "John, assistance to our contractors is a major premise upon which we operate. It is the reason that we enjoy the success in the business that we do. We shall continue to pursue such a source of mutual benefit and good will." (Exhibit E)

13. For some reason not known to me, my foregoing statement prompted the following reply from Mr. Jacobson on February 22, 1972:

> "I regret that Armstrong is unwilling to assure us that the problems we encountered in bidding jobs for Armstrong products in the Philadelphia area were not inadvertent. In fact, it would appear from your letter that our difficulties stem from a concerted effort on Armstrong's part to inhibit us from expanding our successful promotion of Armstrong products into areas served by other Armstrong distributors." (Exhibit F)

14. I recall being shocked by the foregoing reply since I simply could not understand how Mr. Jacobson could possibly have misinterpreted my letter in the manner reflected in his reply. In any event, I subsequently sent a March 9, 1972 letter to Mr. Jacobson in which I again tried to make our position completely clear. In the course of that letter, I stated as follows:

"First, may I say again that there is absolutely no attempt being made to inhibit Jacobson, or any of our contractors, from bidding Armstrong products anywhere. Contractors handling our line often bid and install materials on projects far removed from their home office. . . ."

"Also, our representatives are instructed to service all of our contractors' requests for prices of 'special' items when requested; this is true for technical assistance, too. If you had a problem in this area it certainly must have been inadvertent and we shall take the necessary steps for corrective action. This type of service is one of our strengths as a supplier." (Exhibit G)

15. The foregoing effort on my part was more successful than the preceding one, since on March 16, 1972 Mr. Jacobson wrote back expressing pleasure over the assurances contained in my latest letter. (Exhibit H) In any event, I never again heard any complaint of any kind from Jacobson regarding the extent or nature of the Armstrong support that Jacobson received on its ceilings projects in the Mid-Atlantic region. Further, I understand such support was at all times and in all respects in keeping with Armstrong's policy of providing maximum assistance to its contractor-distributors regardless of the location of the project in question.

16. Turning to another subject, I participated and completely concurred in the decision to terminate Jacobson on March 19 of this year. In the course of making this decision, there was at no time any consideration or discussion among Armstrong personnel concerning Jacobson's sales outside its area of primary responsibility. In the first place, this is simply not a consideration Armstrong would take into account in determining whether or not to terminate a contractor-distributor. Secondly, while Jacobson had in the early 1970's been awarded a fair number of ceiling contracts in the Mid-Atlantic region on the

basis of Armstrong and competitive products, the fact is that well before 1976 it had made the business judgment to substantially withdraw from the Mid-Atlantic region (without any influence whatever from Armstrong). This trend started as early as 1970 with the closing of Jacobson's Philadelphia office and warehouse and with the subsequent establishment of a small sales office in Cherry Hill, New Jersey, manned with one person to sell ceilings and partitions. This venture apparently was not successful, and this operation was also thereafter closed. The volume of business enjoyed by Jacobson dwindled substantially when it removed its presence from the Mid-Atlantic region, and Jacobson relegated its bidding to the occasional big project. Accordingly, since the volume generated in the Mid-Atlantic region was not significant, it could not possibly have been a factor in terminating Jacobson. Consistent with this is the fact that Mr. Jake Snyder, the manager of Armstrong's Mid-Atlantic regional office, was not consulted in connection with the termination decision and was not even notified of it until well after Jacobson had been notified.

17. The reasons for terminating Jacobson were basically twofold, namely: (a) Jacobson's sales of Armstrong ceilings products started and continued to decline as it changed its policy from bidding the broad spectrum of non-residential construction to a very selective approach of bidding primarily on large projects not, in themselves, attractive from Armstrong's viewpoint; and (b) the relations between the two companies had deteriorated to an extent that we strongly believed we could no longer continue to do business with Jacobson. Each of these factors is discussed separately below.

Jacobson's Sales

18. Through 1973, we were pleased with the volume of Jacobson's purchases of Armstrong ceiling products. At some point around 1973, however, Jacobson made the decision to concentrate only on large jobs and to cut back on its sales force and its broad-based sales effort. The result was that Jacobson began to close fewer jobs. We were concerned about this at the time because a reduction in jobs closed during that period meant lower purchases in 1975-1976 and the years ahead. Also of concern was the fact that the big jobs are generally much more competitive than smaller and medium-sized ones and therefore less profitable to Armstrong. In any event, the immediate result was that Jacobson's purchases of Armstrong ceiling products declined from approximately $1,100,000 in 1973 to $816,000 in 1974. While the 1974 volume was still substantial, it primarily represented orders that had been closed prior to 1974. By 1975, Jacobson's purchases of Armstrong ceiling products continued their decline to $588,000 and, much more importantly, Jacobson was closing very few orders that would result in purchases of those products in future years. Thus, we estimated that Jacobson purchases of Armstrong ceiling products would be about $300,000 in 1976 and that such purchases would continue to deteriorate in the years ahead. In fact, Jacobson's purchases for the first quarter in 1976 aggregated $75,000.

19. This decline in volume further is supported by Jacobson's list of "outstanding commitments" for Armstrong materials delivered to Armstrong on April 6, 1976 (Exhibit I). Even assuming that, as Jacobson contends, $500,000 worth of Armstrong materials is involved, this amount should not be

construed as reflecting future actual or annual purchases by Jacobson of Armstrong ceiling products for the following reasons:

(a) The list almost certainly includes all future jobs on which Armstrong ceilings materials might be utilized, so as to assure Jacobson a firm price quotation for jobs it both has bid and been awarded. Thus, actual future purchases will be reduced to the extent that Jacobson is not ultimately the successful bidder on each job.

(b) Orders placed for the jobs listed are not binding on Jacobson, and it is not unlikely that Jacobson will place its final order for some jobs with a competitive manufacturer, again reducing actual purchases to the extent that Jacobson elects to do so.

(c) Many of the jobs listed involve very recent orders. Accordingly, actual shipment (and invoice) dates will extend into the future as long as two years, thereby spreading all purchases finally derived from the $500,000 in Jacobson "commitments" over that entire period.

20. Jacobson's performance in the important Long Island area is typical of the problem faced by Armstrong. Its Long Island branch purchased approximately $350,000 from Armstrong in 1973. These purchases had declined to around $235,000 in 1974. This branch was closed in 1974 and available records indicate practically no shipments of material into this area during 1975-1976. This same situation is applicable to the metropolitan New York and Northern New Jersey areas. As a matter of fact, Jacobson

has now closed down its New York City operation and is operating only from its Elizabeth, New Jersey Branch.

21. Jacobson's decline in ceilings purchases during the 1974-1975 period are the sharpest of any of Armstrong's major contractor-distributors in the New York area. As a matter of fact, Circle Industries sales increased from $886,000 in 1974 to nearly $919,000 in 1975. William Scully's purchases increased from $548,000 in 1974 to $650,000 in 1975.

22. Contemporaneous documents reflect the degree of Armstrong's concern in 1974, 1975 and 1976 over Jacobson's performance. Examples of such documents are identified below:

(a) January 1975 Territorial Analysis by Paul R. Langan of Armstrong:

> "The major shake-up has been with Jacobson & Company.
>
> "Jacobson & Company has been totally reorganized. They no longer are actively bidding work out of Elizabeth. . . . What they have decided to do is to terminate their Plainview, New York Operation, and drastically cut back personnel in Elizabeth . . . . It is obvious that they had to cut back much of their overhead in order to continue in this business. This situation came about because of very aggressive bidding tactics by Sloan Acoustics. By cutting back their personnel they have also abandoned the promotional aspect of the business, seeing as they have no one left to promote. . . .
>
> "Bad business deals and too many bad jobs have forced them into this decision." (Exhibit J)

(b) Spring 1975 Memorandum by P. R. Langan of Armstrong entitled "Long and Short Range Plan New Jersey":

"First of all, I want to start out with the proper contractors. . . . I think that four contractors will be sufficient, but I want to delete any possible non-performers. I will, therefore, suggest that Jacobson & Co. be dropped by Armstrong. Their people are very confused in regards to the future of their business in New Jersey. . . . What they were to Armstrong in the past, as far as an active promotional firm with the ability to close a job, they no longer are. They have no contractor salesmen in New Jersey; where they once had many (in Southern Jersey) . . . With all of these new products to promote, one thing I don't need is another bid firm, one that has trouble closing jobs." (Exhibit K)

(c) Memorandum by Robert A. Baram entitled "Territory Analysis . . . 1976":

"Jacobson was nowhere in 1975. Their entire organization was decimated. Their Long Island operation died with the departure of Hank Eckstein. Their New York staff was cut to the partners and 3 estimators. I see Jacobson as a very small factor . . . but they will survive." (Exhibit L)

(d) Memorandum entitled "Territory Analysis Update for 1975" by P. R. Langan of Armstrong:

"The most drastic change in our contractors organization has taken place at Jacobson & Company. They are no longer actively bidding out of their Elizabeth office, and this has resulted in an empty backlog for 1976. Hopefully they will be making some sort of comeback in 1976. They plan on moving all the company operations from New York into the Elizabeth office by this summer. John Jacobson has made it a company policy to bid only on 'big work' (which is a problem in itself; there is no 'big work'). In keeping with this idea, they have issued pink slips to the remaining salesmen from the Elizabeth office . . . . As of this writing, Jacobson is not a factor among New Jersey ceiling contractors. They have not closed a job in a year and are no longer relied upon by local general contractors for prices." (Exhibit M)

(e) July 31, 1974 Memorandum from Mr. Caldwell of Armstrong entitled "Job Follow-Up Report Second Quarter, (1974)," pg. 3:

"In my first quarter report, I made the statement that with Island Acoustics and Jacobson we appeared to have the horses on the Island. Unfortunately one of our horses passed away which causes me to somewhat retract that statement. Jacobson closed up shop and moved to New York and Elizabeth." (Exhibit N).

Deteriorating Relationship
Between Jacobson and Armstrong

23. In early 1974 Jacobson transmitted to Armstrong an extremely detailed, printed form for use in connection with Jacobson complaints about Armstrong ceiling products. In a covering memo circulating the new form among Armstrong personnel, our Mr. Koehn made the following comment:

"as a concerned student of the ceiling systems business, I thought you'd be interested to know how the big 'J' plans to handle material complaints with suppliers."

"Rather thorough, isn't it?" (Exhibit O).

Handwritten notes of others appearing on Mr. Koehn's covering memorandum were as follows:

"you'd better hold onto your pocket book when you deal with these people."
and

"So, so professional!!"

24. By the end of 1974, Jacobson's complaints in dollars as a percentage of ceiling sales was running at a rate of six times Armstrong's national average. Actually, the ratio would have been considerably higher than that if I had not deleted from the calculation those Jacobson complaints which had some merit on their face. These complaints involved an undue expenditure of time and manpower to resolve and, in any event, relations between Armstrong and Jacobson deteriorated at an accelerating pace throughout 1974 and 1975 to the point that they

were intolerable and to the point that any kind of an amicable business relationship was impossible. This deterioration is evidenced by documents such as the following:

(a) September 5, 1975 - Memorandum from Mr. Wiley of Armstrong to Mr. Butler of Armstrong:

> "I fought this claim for two years and we carried the deduction on our ledgers for that length of time. As a matter of principle, I finally succumbed to Gottfried's plea to clean up the ledger. I was going to carry it forever. As far as I was concerned, it was the same old Jacobson baloney. Make a mistake and then find an excuse to pin it on a supplier.
>
> "John will just find us tougher and tougher to deal with if he insists on this time honored Jacobson approach to 'working' with suppliers." (Exhibit P).

(b) February 10, 1975 Letter from Mr. Baram of Armstrong to Mr. Jacobson:

> "John, it has come to my attention that another Jacobson and Company order has run amiss. . . .
>
> "Let's get this matter off the books as soon as possible. There is absolutely no justification for a credit here - - - our prices are time of shipment unless otherwise noted. We shipped well within our shipping promise when this order went out - - - Therefore the prices billed are correct." (Exhibit Q).

(c) May 21, 1975 Memorandum from Mr. Hadfield of Armstrong to Mr. Smith of Armstrong. Handwritten notes of Mr. Unger and Mr. Smith read as follows:

> "Bob,
>
> "I'd have to know cost but based on a couple of pending claims I have little interest in doing anything for this firm [Jacobson].
>
> "R"
>
> "That's putting it mildly
>
> "Dave" (Exhibit R).

(d) July 16, 1974 Memorandum from Mr. Wiley of Armstrong to Mr. Unger Re: Jacobson's project at the Philadelphia Courthouse:

> "Attached is all our correspondence, our order form and Jacobson's purchase order on the subject job. More importantly is a copy of my note as I took down the requested information from Jack Binder and then quoted him. The prices were confirmed by my letter of November 28, 1972. . . .
>
> "This is the third time in seven months that Jacobson & Co. has tried to hold us responsible for interpretation of specifications, hanging their hat on the basis of our quotation and/or what our literature says or doesn't say . . . .
>
> "To this day we haven't seen a copy of this specification. . . ." (Exhibit S).

(e) May 2, 1975 Memorandum from Mr. Baram of Armstrong to Mr. Butler of Armstrong:

> "John Higgins, the Jacobson salesman, will accept, he now indicates, an STC of 35-39. But, as usual with this customer, there is a kicker . . . .
>
> "So, they are now trying to unfairly squeeze us for an STC of 35-39 at the $.305 price.
>
> "Bob, it is my feeling that they may have a leg here <u>but</u> this is just a ploy to 'sweeten the job' to the tune of $7000 + for Jacobson. . . .
>
> "One more thing, Higgins' main 'job' right now is to 'better the contract' on Jacobson jobs." (Exhibit T).

(f) March 21, 1975 Memorandum from Mr. Gottfried of Armstrong to Mr. Wiley of Armstrong Re Jacobson's project at Newark State College:

> ". . . We see from Bob Butler's memo of February 26 that you were going to write Jacobson and tell them to pay up."
>
> "As you recognize, this thing is now more than a year old; and it would seem in that length of time some agreement could

have been reached which would settle this bill. From our point of view, it seems totally unfair that we should be carrying this outstanding balance." (Exhibit U).

(g) May 9, 1975 Memorandum from Mr. Wiley of Armstrong to Mr. McNaughton of Armstrong:

"John Jacobson was nice enough to pull together the whole ream of correspondence we have had on the subject claim into one nice tidy package. This was with his letter of rebuff addressed to yours truly. . . .

"All of this is patently redicilious (sic). Would you please call me on Monday morning, May 12, to discuss this further. I am going to try to see John on Monday afternoon and take one final stab at settling it peacefully." (Exhibit V).

(h) Handwritten Armstrong Notations on a December 11, 1973 letter from Jacobson to Mr. Wiley of Armstrong:

"This position of a contractor can never be allowed to std. He's a crook" (Exhibit W).

(i) May 28, 1975 letter from Mr. Gottfried of Armstrong to Mr. Jacobson:

"As you are aware, we have several large outstanding deductions on your account which date back many months and, in fact, one goes back as far as February, 1974. We have been advised by our marketing people that these deductions are not in order and that payment should be forthcoming from your company. . . .

"In view of the length of time these deductions have been outstanding, we feel it is only reasonable that we now ask you to pay the total amount by June 13. In the event payment does not reach us by that date, we will seek alternative measures to collect this outstanding balance." (Exhibit X).

(j) Internal Armstrong Note Appearing on Exhibit X:

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"This will confirm Phil Unger's request that we write to Jacobson and tell him the claims are due and give him a couple of weeks to pay. If they do not pay by that time, our plan of action will be to call John Jacobson and tell him we are going to hold orders until they do pay."

(k) July 22, 1975 Memorandum (p. 3) from Mr. Baram of Armstrong to Mr. Wiley of Armstrong:

"I followed up with the customer, continuously, for nearly 18 months. The real serious situation occurred near the end when the amount of sizes was finalized. Until then we did not have a real big problem.

"But, Dick you are right. I'm sure they were shopping that job all along. The same way they do on every job.

"Perhaps we should ask whether we are doing business with honorable people as opposed to how did or could this happen. Are our people that bad? How come every time 'we' screw up it's with Jacobson? Our other contractors bid and take difficult work. Why is it only these people have problems with us?" (Exhibit Y).

(l) August 28, 1975 Memorandum from Mr. Butler of Armstrong to Mr. Wiley of Armstrong:

"Enclosed please find some correspondence from our mutual friend in New York City. . . .

"I realize that the above is probably just a bunch of wasted words, particularly since a policy adjustment has been entered and I signed it. [Explanation of why Armstrong was right] . . . .

"While I realize it's 'water over the dam', I thought you might want to point this out to John if you deem necessary. As John says, 'It's a matter of principle'." (Exhibit Z).

(m) July 11, 1975 Letter to Armstrong from Mr. Phillip Miller of Jacobson:

"Your invoice for $8.24 to cover costs of additional freight is hereby returned. Whatever deal the driver of the common carrier and the customer made in regards to delivery of material to a special location was between the driver and the customer. It is our understanding that the customer paid the driver $10.00 to deliver this material to her basement since the general contractor was absent.

"Regardless, all deliveries are tailgate and we understand this as do all our customers. This is an apparent cover for the additional time the carrier driver made for 'coffee money'." (Exhibit AA).

25. In addition to the foregoing, Jacobson did a number of other things which, quite frankly, we just found abrasive. While no particular such occurrence was in any way determinative or even a factor in the decision to terminate Jacobson, I nevertheless feel that a few examples such as the following will help to convey a further understanding of the presently hopeless nature of the relations between the two companies.

26. On several occasions, Jacobson stated to me or to individuals in our regional office that it was considering institution of non-antitrust related litigation regarding disputes arising in the course of day-to-day transactions between the two companies. I frankly considered such statements as threats, although until the instant litigation, Jacobson did not institute any lawsuit against Armstrong.

27. Another example concerns Jacobson's "Supply Center." In 1974 Jacobson opened a "Supply Center" from which it sold Armstrong and other ceiling products at wholesale to those who wished to install them themselves. We did not quarrel with that. Several other Armstrong distributor-contractor firms located in the Northeastern region also conduct wholesaling activities. The distinction, however, is that unlike Jacobson, these firms continue to place major emphasis on bidding the entire commercial contract market and their contract volume continues to grow. The irritant occurred in October, 1975, when Jacobson advertised Armstrong ceiling products from its "Supply Center" at 33-1/3% off Armstrong prices. (Exhibit BB). Again, we do not dispute the right of any of our contractor-distributors

to sell Armstrong ceiling products at whatever prices they deem appropriate. What concerned me about Jacobson's publishing a price list at "one third" off Armstrong ceiling prices, however, was the following:

(a) It was not clear in the mailer that Jacobson was "selling off" existing stock. This, coupled with the specific reference to Armstrong costs, led me to be concerned that our other contractor-distributors would conclude that Armstrong had given a special break to Jacobson on prices. Whether I was right or wrong, I had the feeling that the price list was intentionally worded with a view toward conveying that impression, and

(b) Much more importantly -- the ceiling prices charged to our contractor-distributors are very confidential. The reason for this is self-evident, namely: if non-Armstrong contractors knew what Armstrong contractor-distributors paid for their products, they would be in an advantageous position to bid against an Armstrong contractor-distributor on a specific project. For this reason, I felt that our other contractor-distributor customers were going to be quite irate when they learned that Jacobson had published these confidential prices and that this could end up in competitive hands. This is what Mr. W. Koenig of Armstrong meant when he transmitted the Jacobson mailer to me with the following note:

> "The enclosed stock sheet should be of interest. Thought you would like to know what some of our irate customers are talking about. Getting rid of existing old stock is one thing but why broadcast our current prices to the trade." (Exhibit CC).

28. Upon receiving the Jacobson mailer from Mr. Koenig, I was frankly irritated for the reasons set forth above. Accordingly, I transmitted it to Mr. Wiley, the head of our Northeast regional office, with the following note:

> "Here is an example of what I mean - We'll hear about this from many of our Phila customers. These people don't give a damn about [Armstrong] - They never have and never will. I doubt very seriously if the $ we'll get in '76 is really worth the grief." (Exhibit CC).

29. Another typical problem occurred in February, 1976. In order to understand what happened at this time, it is necessary to understand that it is a very complex undertaking indeed to bid on Government GSA programs such as federal office building projects. Without belaboring the point, these projects involve complicated performance specifications covering acoustics, lighting, fire-ratings, flexibility, etc., requiring Armstrong to develop a detailed technical proposal for the contractor-distributor desiring to bid the project. Armstrong had worked with Jacobson on one of these projects in 1973 (New York Job - Foley Square) and had put forth a major effort on Jacobson's behalf, only to have Jacobson bid another manufacturer's ceilings system.

30. We fully recognize that Jacobson is completely within its rights to bid competitive products whenever it wishes, and I do not recount the foregoing as an example of an irritant. I do recount it, however, as background for what occurred in February, 1976, when Jacobson representatives approached Armstrong personnel with a proposal. While I was not involved in the ensuing discussions, I constantly kept abreast of the situation in a supervisory capacity. I understand that the following is what occurred:

(a) The Jacobson representatives said that Jacobson was going to bid on a Federal Office building ceiling job in Atlanta, Georgia and asked if Armstrong would like to provide a ceilings price quote. They said that while Armstrong could not legally refuse to quote them, we nevertheless didn't have to if we didn't want to and that they would simply quote competitive products in that event.

(b) Given an option, we had no interest in quoting Jacobson on the project. Based on past experience, I was convinced that Jacobson would simply take our quote and use the knowledge to its advantage in bidding competitive products against other Armstrong contractor-distributors.

(c) When Mr. Jacobson was informed of our feelings that, given an option we would prefer not to quote, he switched gears and demanded a quotation from Mr. Lopez of our Northeast regional office.

(d) Upon receiving the foregoing demand, Mr. Lopez asked if Jacobson would commit to bid Armstrong if we provided the quotation. The answer was an emphatic "no."

(e) As soon as possible thereafter, Mr. Lopez provided him with the quotation that had been demanded. As I had suspected, Jacobson then used the knowledge gained from Armstrong's quotation to bid competitive products against the Armstrong contractor-distributors which were bidding Armstrong ceiling products on the

project. As I understand it, Jacobson won the bid on this basis (see memorandum from Mr. Lopez to Mr. Wiley (Exhibit DD).

31. For the following reasons, I do not believe that Jacobson will be irreparably harmed by our having terminated it as an Armstrong contractor-distributor of ceiling products:

(a) Jacobson built its ceiling business on the basis of non-Armstrong ceiling products during the more than 70 years it was in business before it became a contractor-distributor of Armstrong ceilings.

(b) Over 90% of ceilings specifications that are written in the Northeast and Mid-Atlantic regions apply to more than one competitive ceiling product. In addition, there are many lines of competitive ceiling products which are available to, and utilized by, Jacobson. These lines include Celotex, U.S. Gypsum, Conwed and Owens-Corning. While I prefer to believe that Armstrong's ceilings line is the best, I nevertheless recognize that these competitive lines are comparable to Armstrong's, both in quality and in breadth of assortment of products. In any event, the total assortment of products contained in these competing ceiling lines is as broad as, if not broader than, Armstrong's.

(c) Jacobson actively utilizes all of the above-mentioned major ceiling lines and, in addition, has access to almost all other ceiling lines that it desires to utilize.

(d) While Armstrong has certain ceiling designs which its competitors do not have, its competitors also have certain designs which Armstrong does not have. The fact is that there are practically no Armstrong products, if any, for which there are no comparable competitive substitutes.

(e) While I have no understanding regarding what constitutes a relevant product or geographic market in legal terms, I do have some understanding regarding Armstrong's market share with regard to ceiling products. On a national basis, Armstrong sells well under 35% of such products, and I further understand that Armstrong's percentage in New York City, Long Island and Northern New Jersey is considerably less than the national average.

(f) Jacobson's sales volume in no way stems entirely from the sale of ceiling products; it is my belief that the Jacobson firm has other businesses (e.g., partitions) that are larger in dollar sales than its ceilings volume.

(g) A very small percentage (perhaps 5-8%) of the total specifications for ceilings on commercial buildings require a "proprietary" product, whether it be Armstrong or a competitor's. Of those that are so specified, there is absolutely no assurance that the specified product finally will be installed on the project. Almost invariably, architects will consider the substitution of a comparable product if requested by the contractor. Thus, the "breaking"

of a "proprietary" specification by submission of a comparable substitute is a common practice, occurring in approximately 60-70% of all cases. As stated previously, practically every, if not every, Armstrong "proprietary" ceiling product has a comparable competitive substitute. The additional fact is that most of these comparable competitive substitutes are included in lines already utilized by Jacobson and the remaining substitutes are accessible to Jacobson. Accordingly, Jacobson will not be harmed by its inability to purchase Armstrong's "proprietary" ceiling products directly from Armstrong, since it will be able to compete effectively with comparable products both in its contract and, I should add, its wholesale ceilings businesses.

(h) Almost all, if not all, Government ceilings projects open their specifications up to various competitive products. In addition, most large non-Government projects open up their specifications to several competitive products. Almost all of these projects involve ceiling products that are not "proprietary" items and are common to all competitive ceiling lines. Accordingly, since Jacobson now concentrates almost solely on larger jobs, it should almost never encounter a specification that would insist only on an Armstrong ceiling product.

(i) There always have been and there presently are many contractor-distributors in the Northeast region that do not carry the Armstrong line, but nevertheless have competed successfully with Jacobson and our other contractor-distributors over the last 8 years.

(j) The Jacobson Supply Center, which wholesales ceiling products to those who wish to install such products themselves, should not be harmed by the Armstrong termination. To begin with, its volume is quite low. Furthermore, as indicated above, Jacobson utilizes or has access to various competitive lines that include the breadth of Armstrong ceiling products. In addition, the fact is that there are more than 150 similar supply centers in the United States. A list identifying such centers is attached as Exhibit EE and a map indicating their locations is attached as Exhibit FF. Of all of these 150 centers, not one handles Armstrong ceilings as its major line and possibly only one or two handle any of our ceiling products at all. Further, I understand that, in general, these centers are doing a flourishing business without Armstrong ceiling products.

32. While it is my view that Jacobson will not be appreciably harmed by the Armstrong termination, it is also my view that Armstrong would be substantially prejudiced if it were ordered to reinstitute relations with Jacobson. First, we terminated Jacobson because we felt that Jacobson was not adequately promoting and bidding Armstrong ceilings. If we were compelled to resume sales to Jacobson, this condition and the concomitant damage to Armstrong that prompted our decision would also resume. Second, we are currently in the process of studying various alternatives concerning Armstrong's ceilings representation in the areas where Jacobson did most of its Armstrong ceilings business. This work would come to an outright standstill during the period of litigation, and our various

options in this regard would be virtually eliminated if we were forced to resume relations with Jacobson. Lastly, and just as importantly -- it is a simple fact that relations between Armstrong and Jacobson have deteriorated to the point where we feel we just can't do business with Jacobson. If Armstrong were ordered to resume business dealings with Jacobson under such circumstances, the result would be an administrative quagmire and a clash of personalities which would be of very serious proportions.

33. For all of the foregoing reasons, I respectfully request that Jacobson's motion for a preliminary injunction be in all respects denied.

J. Phillip W. Unger

Phillip W. Unger

Sworn to before me this

10th day of June, 1976.

Doris M. Murry

Notary Public

DORIS M. MURRY, Notary Public
LANCASTER, LANCASTER COUNTY, PA.
MY COMMISSION EXPIRES JAN. 29, 1979

Exhibit A Annexed to Affidavit of Phillip W. Unger

Letter to James W. Goodwillie from Martin J. Brennan, Dated March 4, 1968

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

321 a

March 4, 1968

PERSONAL & CONFIDENTIAL

Mr. J. M. Goodwillie, District Manager
Armstrong Cork Co., Inc.
60 West 49th Street
New York, New York

Dear Mr. Goodwillie:

At our last meeting I informed you that we would give careful consideration to the question of what areas would be involved should we decide to represent a major manufacturer other than, or in addition to, our present supplier or suppliers. You indicated that you would then consider our conclusions as they affect your own plans and let us know what is possible from your viewpoint.

One matter that we both gave little attention to in our considerations thus far is the fact that our Philadelphia office represents a major unit of our company and cannot be isolated from the broad subject. We believe that since you indicated that, as manager of your company's New York area, your jurisdiction does not include the areas covered by our Philadelphia office (eastern Pennsylvania, southern New Jersey and northern Delaware) that one of your regional officers who has jurisdiction over the entire area under discussion be brought in at this time for our further mutual explorations.

Long Island Area - Nassau and Suffolk Counties

In this area we would want to be the sole distributor in this assigned territory. After careful consideration it is our firm belief that we can out-purchase your present sole distributor on all products across the board. Our extensive business in the school, hospital, office and shopping center markets would insure a good volume of competitive type products. We are also certain that with our skilled sales staff in that area plus the work of our Environmental Control Systems Department we could do an outstanding job on specification items, including, but not limited to, Luminaire, Ceramaguard, etc. Our conclusion is that dual distribution would inhibit our ability to build up specification work and the area is too small to have two agressive distributors fighting each other for the order for the same product.

Westchester - Rockland - Fairfield Counties and
Five Counties of New York City

In these areas we would want to be the sole distributor in the assigned territory of Westchester, Rockland and Fairfield Counties and the dual distributor in the assigned territory of the five

counties comprising New York City. Because this is all the territory that has been handled for thirty-six years as that of our New York office, it is not feasible to handle either of these two areas without the other.

There is no question in our minds that we can produce more business in the three counties north of the City than your previous distributors. Moreover, we have recently been enjoying great success in producing specification work in all of these counties and know that we can do an outstanding job on your line there.

In New York City, as outlined to you, we have salesmen in Queens, Brooklyn and Staten Island, Bronx and three Manhattan. This staff of six men is augmented by our ECS Department consisting of a manager (who sells), three sales engineers and an inside staff man. There is a lot of area and business in New York City and we question if any one company can really cover the city. It is for this reason that we think that dual distribution is acceptable from our viewpoint and desirable from yours. We do not seek sub-standard markup business and at times this means that we may not be active in the speculative office building market, city schools and certain types of city, state and federal work. We have, however, proved that we can compete with anyone when conditions are favorable as was the case in the Chase Manhattan Building, numerous packages for Diesel Construction, Uris Brothers, William Kaufman and others, plus the General Motors Building, etc.

We would naturally prefer that your specification items, particularly Luminaire, would be available only to us in the same way that U.S.G. and O.C.F. in areas where they have multiple distribution still limit proprietary items, such as Airson and Dimensionaire, to one distributor. However, we understand that up until now at least, it has been your policy to put all of your acoustical products and systems through all of your distributors. We can go along with this policy if need be even though we cannot put the same amount of manpower and promotion on these specification items as we could afford to do if we had sole distribution. We could still develop a respectable volume of business in this area because we have the contacts in architects and mechanical engineering firms that we have developed over a twelve year period of actively promoting and selling radiant - acoustical ceilings.

Northern New Jersey (from Mercer and Ocean Counties north)

Our northern New Jersey operation based in Elizabeth, New Jersey has always been one of our strongest areas. Since opening this office in 1941, we have enjoyed a very stable situation in both sales and construction staff. Continuity has paid off for us. At present we have six acoustical salesmen and one partition salesman in addition to the branch manager. Additionally, this office (as does Plainview and New York) has a call on our ECS Department sales staff. Our chief construction superintendent was with us when we opened the office twenty-seven years ago and is still going strong. Today he has two assistant superintendents under him. This office bills in excess of three million dollars worth of ceiling work annually.

As explained to you, in September, 1967 we gave up our New York warehouse in Long Island City and by expanding, modernizing and mechanizing our warehouse buildings on our own property in Elizabeth, created a consolidated New York - New Jersey warehouse. By this

consolidation we improved our efficiency in trucking and handling of materials, enjoy a better labor situation and will give both New York and New Jersey the benefit of a more complete inventory. Our competitive position has been strengthened by this move.

However, from the standpoint of our present discussion, this warehouse consolidation makes it a virtual impossibility to have other than a common major supplier of materials for both offices. We believe that dual distribution in this area is the minimum situation that would possibly be mutually acceptable.

We can discuss Plainview by itself, but beyond this we have the situation that it is awkward to think in terms of Westchester-Rockland-Fairfield without New York City and it is uneconomic for us to think of New York City without northern New Jersey. However, there are positive gains in these suggested plans as far as your company is concerned because our company's purchases of acoustical materials is in the low seven figure bracket and we discount our bills. I assume you have a D & B report on us which shows that for many years now we have enjoyed an AaA 1 rating.

When you have had an opportunity to consider the above, including our request that the Philadelphia area be made a part of this discussion, please let us know when we can get together to pursue the matter further.

Sincerely,

Martin J. Brennan
President

MJB:mo

CC: Mr. John D. Jacobson
Mr. Thomas F. Head

Exhibit B Annexed to Affidavit of Phillip W. Unger

Letter to Martin J. Brennan from James W. Goodwillie, Dated March 28, 1968

March 28, 1968

Mr. Martin J. Brennan
Jacobson & Company, Inc.
104 East 25 Street
New York, New York (10010)

CONFIDENTIAL

Dear Mr. Brennan:

On March 4, 1968 you wrote us proposing an alliance between your Company and Armstrong involving your several operations. As you know, we have had several meetings since that time to discuss various aspects of that proposal. In addition, we have thoroughly reassessed our position in light of your requests.

Long Island Area - Nassau and Suffolk Counties

In this area we would agree to your being our sole distributor, assuming a mutually exclusive arrangement. We would expect to be your sole major supplier in this area, an arrangement similar to our current exclusive situation.

Westchester - Fairfield Counties and
Five Counties of New York City

In these areas we would agree to dual distribution. We could not exclude our present representation in either Westchester or Fairfield County. We would have no justification for an exclusive arrangement since none of the three contractors involved are actually based in either of these counties. While we would not expect to be an exclusive supplier, we would expect to receive product lines where we could supply equal or superior products.

325 a

Northern New Jersey - Rockland County

With reference to your Elizabeth operation, we would agree to dual distribution and we include Rockland County since you consider it a part of this operation. Our area of jurisdiction coincides with yours except for that portion of Mercer County serviced by your Elizabeth office. Since you service the major metropolitan area of that county (Trenton) from your Philadelphia office, there should be no basic conflict. Again, we would expect the same consideration with respect to other suppliers as in the case of New York City.

With respect to the Philadelphia area, we can only refer you to Mr. Sampson's remarks during our recent meeting. The unavailability of the territory at the moment does not close the door to possible consideration at some time in the future. We would, however, expect complete respect of our Philadelphia office's current position on the matter.

We envision one problem with respect to your joint New York - New Jersey warehousing facility at Elizabeth. This warehouse services areas assigned as the responsibility of four different Armstrong salesmen: New York City, New Jersey, Westchester-Rockland and Fairfield. Since sales credit is of significant importance to these men, and to our Company in evaluating their performance, we would ask that a system be devised to enable you to give us a breakdown of your warehouse shipments to these areas. Direct shipments would pose no problem, but it would be important to us to get an accurate breakdown on materials shipped by us to your Elizabeth warehouse.

If we can agree on the areas and proposals out-lined above, we believe we are in a position to discuss positive and immediate action. We would appreciate hearing from you further at your earliest convenience and would hope to conclude negotiations prior to your departure on your extended trip.

Very truly yours,

J.M. Goodwillie
District Manager

PAT

J.O. Sampson, Building Products Division, Lancaster
J.K. Rankin, Building Products Division, New York

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Exhibit C Annexed to Affidavit of Phillip W. Unger

List of Contractors Who Have Bid and Executed Work Outside of Their Normal Trading Areas in the Last Two Years

Subject: Contractors Whom Have Bid & Executed Work Outside Of Their Normal Trading Areas In The Last Two Years

Contractor	Location	Bid Location
Circle Industries	Bronx	Altanta
Circle Industries	Bronx	New Jersey
Circle Industries	Bronx	Connecticut
Circle Industries	Bronx	Boston
Circle Industries	Bronx	Virginia
Circle Industries	Bronx	Maryland
Circle Industries	Bronx	Philadelphia
Berger	Philadelphia	New Jersey
William J. Scully	Long Island City	Detroit
Sloan Acoustics	Paterson, N.J.	Pennsylvania
Arcon	Buffalo	Wisconsin
Arcon	Buffalo	St. Louis
Voss-Hutchinson (Joint Venture with Union Wholesale)	Los Angeles	Delaware Wilmington County
Shugart	Los Angeles	Rochester Xerox
Island Acoustics	Long Island	Vermont
Island Acoustics	Long Island	New Jersey
Rochester Acoustical	Rochester	Beaver Falls
Mancini-Klimchuck	Binghamton	New York (all over)
Bader Company	Burlington, Vt.	Rhode Island
Davis-Fetch	Troy	Detroit

Jacobson, your file

Exhibit D Annexed to Affidavit of Phillip W. Unger

Letter to John D. Jacobson from J. O. Sampson, Dated February 3, 1971 and Memorandum to J. E. Snyder from J. O. Sampson, Dated July 6, 1970

327 a

February 3, 1971

Mr. John D. Jacobson, President
Jacobson & Company, Inc.
104 E. 25 Street
New York, N. Y. 10010

Dear John:

Following through on our telephone conversation of last week, I again discussed with Jake Snyder our situation in the Philadelphia market.

Jake is distressed, as I am, that you had been led to believe that his office would be prepared to work closely with your Philadelphia branch starting in 1971. If you gained this impression from me, I can only apologize for misleading you. You did point out last summer that it would be impractical to carry two manufacturer's stocks at Elizabeth, and that you would be shipping Armstrong material for remodel jobs into the Philadelphia market.

We agreed that it would not be practical to service all of your jobs from Elizabeth and that you would need factory shipments to job sites to operate efficiently. I did ask that you delay any shipments from our factories into Philadelphia until after January 1, 1971 as this would be upsetting to our long standing relations with Berger.

Jake recognizes your problems with a centralized warehouse at Elizabeth and your right to order Armstrong material for shipment into his territory when this is to your advantage. Legally, we can't prevent this, but frankly, we would prefer that you do not promote or sell our materials in that market.

Looking strictly at our Philadelphia territory, we still do not feel it would be fair to Berger to service your Philadelphia office from our Philadelphia office. We have operated with Berger as our sole distributor in the Philadelphia market for over 20 years. During that period, Berger has consistently increased their sales of our products, and their performance last year was exceptionally good.

With this long relationship, our Philadelphia office has full access to all of the contacts, information, and objectives of the Berger group. Jake doesn't feel that his men could now work closely with your Philadelphia Representatives without violating confidences that should be respected.

I know that we have gone over all of this ground before, and I may have been unfair in the past in agreeing that there was always a chance that our

situation in Philadelphia would change. Actually, we have an even greater obligation to Berger today than when we first discussed our association with your company three years ago. Jake's position is that you have the right to promote and sell Armstrong materials in the Philadelphia market if you elect to, but he doesn't feel that he should encourage this through his office.

In developing this business, we have always felt that our district managers must be given the right to establish the distribution that they feel is best for their own territory, even if this does not mesh well with the distribution established in an adjacent territory. Our managers know they have this authority, and are free to establish programs and objectives with their customers, without concern that their decisions will be revised by our home office.

In writing to Van Park, Jake was trying to be fair and objective by indicating that he did not feel he could service your Philadelphia branch. We recognize that it will not be fully satisfactory or effective to obtain information, samples, etc., through our New York office, but this is the only arrangement we're in position to offer. I think we would be wrong to imply that there is any real chance that our position is likely to change in the foreseeable future.

I hate to write such a blunt letter, but I am anxious to be as honest as possible and prevent any further misunderstandings.

Very truly yours,

J. O. Simpson, Manager
Architectural Sales
Building Products Division

CAS

Good Luck

Bldg Prod Div
R. C. Wiley, Saddle Brook
J. E. McGinty, Saddle Brook
J. E. Snyder, Wayne
W. Koenig, Wayne

RECEIVED
FEB 05 1971
ARMSTRONG CORK CO.
ARCHITECTURAL
NEW YORK DISTRICT OFFICE

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329 a

July 6, 1970

J. E. Snyder, Bldg Prod Div, Philadelphia

J. O. Sampson, Bldg Prod Div, Lancaster

Jacobson & Company
Philadelphia Branch

In a telephone conversation with John Jacobson Thursday, he advised that they had reached the definite decision to close their Philadelphia warehouse on August 1. While Jacobson will continue to maintain the same sales staff in Philadelphia that they have employed in the past, the only Jacobson warehouse from which this branch can draw will be Elizabeth. Jacobson is stocking Armstrong almost 100% at Elizabeth, and it will be either economical from their standpoint or desirable from our standpoint to carry two major lines at Elizabeth.

Accordingly, whether we like it or not, there will be Armstrong material show up on Jacobson jobs which are supplied from their Elizabeth, New Jersey, warehouse.

In our phone conversation, I told John that you were extremely reluctant to recognize Jacobson in Philadelphia as an Armstrong contractor. I related the reasons for this which you had given me - that Berger is having a wonderful year with us, that the timing is bad from their standpoint since they have been harassed with labor difficulties, and that the timing is bad from Armstrong's standpoint since it appears very likely we are going to have labor difficulties at both Pensacola and Beaver Falls.

I told John that if he felt they had to serve their jobs from an Armstrong stock at Elizabeth, we would accept it. I told him that I would appreciate their not shipping any large jobs direct from our factories, unless or until you are prepared to recognize their Philadelphia branch as a full-fledged Armstrong customer. John mentioned that if he were to place an order with us for shipment to Philadelphia, we would have no way, legally, to refuse it, and, of course, he is right. I do not think he intends to do this as we both agreed that it would make a lot more sense if we could work with their Philadelphia branch rather than merely tolerate them.

I guess, Jake, that this has finally boiled down to the place where I have to ask you for the overall good of the business to accept Jacobson's branch in Philadelphia. While I know you feel that timing is wrong, and I do recognize that we may end up with lower sales from the Philadelphia market because of this development, the only alternative is to close out Jacobson in New York, and this, I think, would be a bad move from the standpoint of the Company's overall business. While the volume we have received from Jacobson has been somewhat disappointing, nevertheless, it is substantial and about the equal of what we obtain from Berger. The comparative purchases are as follows:

BEST COPY AVAILABLE

Jacobson	- First Quarter	- 1970	-- $162,000
Berger	- First Quarter	- 1970	-- 199,000
Jacobson	- Year	- 1969	-- $749,000
Berger	- Year	- 1969	-- 636,000

I am sure you will want Berger to hear from Armstrong rather than from someone else that Armstrong materials will start showing up on Jacobson jobs sometime after August 1. I am sure that John Jacobson would work with us in any fashion that you might desire on the question of when we might start shipping direct from our plants to job sites on Jacobson jobs. This is bound to happen eventually, so you may decide that you want to give them a green light on this at the same time as they take the green light on shipments from their warehouse.

On the question of sales credit, wherever the book may read, we will make arrangements to insure that the Philadelphia Office gets full sales credit on any Armstrong material that Jacobson may ship to their jobs from their Elizabeth warehouse or on direct shipments from Armstrong plants into the Philadelphia territory.

I am sorry that our relations with a customer in another office has forced us to ask that you accept this. I don't see how we have any other course.

SEB

cc-R. C. Wiley, Bldg Prod Div, New York

Exhibit E Annexed to Affidavit of Phillip W. Unger

Letter to John D. Jacobson from Phillip W. Unger,
Dated February 4, 1972

331 d

February 4, 1972

Mr. John D. Jacobson, President
Jacobson & Company, Inc.
104 East 25th Street
New York, NY 10010

Dear John:

Thank you for your letter of January 17 to Mr. Binns concerning the difficulty you have experienced at your Cherry Hill, New Jersey sales office. I recently assumed responsibility for this division so he personally asked me to look into this matter and respond directly to you. I apologize for the delay in writing but I did want to carefully review this matter first.

As you know, we presently have a number of other contractors in and around the Greater Philadelphia Area. Their performance in the past has been excellent and our participation in the commercial ceilings business in that market good. At the present time, we do not see the necessity to expand our current contractor distribution system there.

We certainly respect and encourage your right to sell whomever and wherever you desire. However, we staff our regional offices with enough personnel to service contractors located in that area. Dick Wiley, Joe McGinty, Dave Dambar and Bob Baram will continue to render whatever assistance your operations may require. Our Philadelphia personnel will do the same thing for our contractors there.

Please understand that we are not staffed to handle requests for specialized information concerning jobs far removed from our personnel in either office. We also feel it detrimental to our mutual interests to further expand the present responsibilities of either staff.

John, assistance to our contractors is a major premise upon which we operate. It is the reason we enjoy the success in this business that we do. We shall continue to pursue such a course of mutual benefit and goodwill. We do appreciate your bringing this matter to our attention and please feel free to contact me again if you have further questions.

Sincerely,

Phillip W. Unger
General Sales Manager
Architectural Ceiling Systems Division

DJH

J. V. Jones, Pres Off
F. O. Schweizer, Bldg & Ind Prod Opr
J. W. Tryon, Legal
W. W. Locke

Exhibit F Annexed to Affidavit of Phillip W. Unger

Letter to Phillip W. Unger from John D. Jacobson,
Dated February 22, 1972

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

332 a

ABOVE ALL Quality OVER 80 YEARS

February 22, 1972

Mr. Phillip W. Unger
General Sales Manager
Architectural Ceiling Systems Division
Armstrong Cork Company
Lancaster, Pa. 17604

Dear Phil:

Thank you for your letter of February 4th.

I regret that Armstrong is unwilling to assure us that the problems we encountered in bidding jobs for Armstrong products in the Philadelphia area were not inadvertent. In fact, it would appear from your letter that our difficulties stem from a concerted effort on Armstrong's part to inhibit us from expanding our successful promotion of Armstrong products into areas served by other Armstrong distributors.

I am glad to see that you recognize that Armstrong cannot and does not intend to restrict the area within which we can install material purchased from Armstrong. However, as you must be aware, the refusal of your sales representatives to furnish us with prices for special materials and other necessary technical assistance will, in many cases, including the Penns Grove job mentioned in my letter of January 17th to Mr. Binns and another job in which we are interested in Allentown for the Pennsylvania Power and Light Company, effectively serve to preclude us from bidding Armstrong products. The refusal to furnish us with this assistance on Philadelphia area projects is tantamount to a restriction against reselling Armstrong material we purchased from you for installation on these projects.

To furnish us with the assistance we seek certainly

will not unduly tax the representatives of your Philadelphia regional office, as you suggest, since they will presumably furnish the identical information that we seek to other Armstrong distributors who propose to submit bids for the jobs in question. Of course, by aiding some of your distributors in this fashion, Armstrong also leaves itself open to a charge that it has improperly discriminated in the services and facilities furnished to different purchasers of Armstrong products.

I trust Armstrong will reconsider its position and confirm to us that it will furnish us with the same technical services and assistance that it furnishes to other Armstrong distributors for jobs in the Philadelphia area. Of course, we would also expect that any products we may order for ultimate installation on a Philadelphia area project will be offered to us at the same prices as offered to our competitor distributors.

I would appreciate a prompt reply.

Sincerely,

JOHN D. JACOBSON
President

cc- Mr. J. H. Binns,
President

Exhibit G Annexed to Affidavit of Phillip W. Unger

Letter to John D. Jacobson from Phillip W. Unger, Dated March 9, 1972

March 9, 1972

Mr. John D. Jacobson, President
Jacobson & Company, Inc.
104 East 25th Street
New York, NY 10010

Dear John:

I received your letter of February 22, and one thing is rather apparent. It is difficult to get complete understanding of one's position in a letter and I only wish we had the opportunity to discuss your questions in person. There remains some misunderstanding based on comments in your last letter that I should attempt to clarify.

First, may I say again there is absolutely no attempt being made to inhibit Jacobson, or any of our contractors, from bidding Armstrong products anywhere. Contractors handling our line often bid and install materials on projects far removed from their home office.

Now let me explain an area of our responsibility in this manufacturer-contractor relationship. Our field organization does promote Armstrong products and systems to the specifying influences in the marketplace. Once a job has been specified, it becomes the contractor's responsibility to take the job off, estimate and bid it and, if he is awarded the contract, to provide proper installation based on the plans and specifications furnished by the architect. Our men are not qualified to perform these functions and we as a Company do not accept the responsibilities involved. Some manufacturers do bid direct and provide for installation. We have chosen to distribute through approved Ceiling Systems Contractors.

You mentioned pricing. We publish prices for our products, and they are furnished to all Armstrong contractors to assist them in bidding ceiling jobs. Deviations are made from this list only to meet specific competitive situations reported by the contractor on a specific job. This has been done with Jacobson as well as with other contractors and is a common practice in the industry.

Also, our representatives are instructed to service all of our contractors' requests for prices of "special" items when requested; this is true for technical assistance, too. If you have had a problem in this area it certainly must have been inadvertent and we shall take the necessary steps for corrective action. This type of service is one of our strengths as a supplier.

Most subcontractors do not order material until the job is awarded. It is virtually impossible, and certainly impractical, to anticipate projects and order accordingly. This is particularly true for the sophisticated type of integrated ceiling job mentioned in your last letter. For this reason, and since we do not inhibit a contractor's bidding activity, I do not understand your comment that we were restricting you "against reselling Armstrong material we purchased from you for installation on these projects." There is normally at least 9 to 12 months between contract award and ceiling installation on a monumental type building, more than ample time to order and receive material.

We do not discriminate against any of our contractors. We have always attempted to answer questions raised by any and all contractors bidding on a particular project and will continue to do so. Some questions of a technical nature are submitted to Lancaster and our salesmen know when to call for the answers. Also, our prices are the same to all of our contractors, and we will continue to respond impartially to competitive pricing of other manufacturers on jobs reported by the contractor, regardless of his location or regional office.

John, as I mentioned earlier, I would enjoy meeting with you to answer personally any questions you might have. We value our association with Jacobson, make no mistake about that. I will be out of town until March 17, but when I return let's try to get together. I will give you a call when I return.

Sincerely,

Phillip W. Unger

BJH

R. C. Wiley, Arch Clg Sys Div, Saddle Brook

Exhibit H Annexed to Affidavit of Phillip W. Unger

Letter to Phillip W. Unger from John D. Jacobson,
Dated March 16, 1972

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

ABOVE ALL Quality OVER 80 YEARS

336 a

March 16, 1972

Mr. Phillip W. Unger
General Sales Manager
Architectural Ceiling Systems Division
Armstrong Cork Company
Lancaster, Pa. 17604

Dear Phil:

I was pleased to receive your letter of March 9 and your assurance that Armstrong "... representatives are instructed to service all of our contractors' requests for prices of 'special' items when requested; this is true for technical assistance, too."

Phil, I think it would be most desirable to establish communications between your Philadelphia office and our Cherry Hill office. I am sure we will find many great benefits will accrue from this new relationship between our two regional offices. This can be set up with our Samuel J. Schanzer, Vice President in Charge of Sales.

I look forward to meeting you in the near future. I trust you will attend our CISCA Convention April 23 - 26 in Atlanta and hope to see you there.

Regards,

John D. Jacobson
President

JDJ:mo

CC: Samuel J. Schanzer
Robert R. Iatesta
Ivan C. Park, Jr.

Called John Jacobson 3/21 re meeting at CISCA Set up 4/12 in Atlanta for Sunday

Exhibit I Annexed to Affidavit of Phillip W. Unger

Letters to Richard C. Wiley from John D. Jacobson, Dated April 6, 1976 and Enclosures

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

ABOVE ALL Quality OVER 80 YEARS

337 a

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

April 6, 1976

Mr. Richard C. Wiley
Regional Manager
Architectural Ceiling Systems Division
Armstrong Cork Company
Park 80 West - One
Garden State Parkway at Interstate 80
Saddle Brook, New Jersey 07662

Dear Dick:

Supplementing our previous letter of this date, we also have an outstanding commitment from you on the following:

Job: Nassau Community College
Location: Nassau County, New York
General Contractor: Carlin-Atlas
Approximate Shipping Date: Indefinite
Material Required:
Our Purchase Order #1510, your Requisition #22365 Rev. II
Copy of purchase order will follow.

Very truly yours,

JACOBSON & COMPANY, INC.

John D. Jacobson
President

JDJ:mo

CC: Joseph L. Fishman

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

Above All Quality
Over 80 Years

338 a

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

April 6, 1976

Mr. Richard C. Wiley
Regional Manager
Architectural Ceiling Systems Division
Armstrong Cork Company
Park 80 West - One
Garden State Parkway at Interstate 80
Saddle Brook, New Jersey 07662

Dear Dick:

In accordance with your March 19, 1976 letter we are writing to you to outline our "outstanding commitments" for Armstrong materials. Let me first comment on your letter.

a. You listed on requisition (#23284 dated 3/19/76) twice.

b. Your Requisition #23156 dated 12/4/74 should read #21356. This order should be cancelled.

c. We expect you to honor price commitments given verbally and in writing for materials on jobs that we have under contract.

d. In some instances material cannot be taken within four months and, of course, we expect you to deliver in accordance with job schedules and your commitments to Jacobson & Company.

Let me outline our outstanding commitments:

1. Job: Herbert H. Lehman College Complex I
Location: Bronx, New York
General Contractor: John T. Brady & Company
Approximate Shipping Date: Job suspended indefinitely. Shipping date is not know. This job was stopped by the Dormitory Authority because of lack of funds. See enclosures #1a, #1b, #1c and #1d.

2. Job: Essex County College
Location: Newark, New Jersey
General Contractor: Jos. L. Muscarelle, Inc.
Approximate Shipping Date: As soon as possible.
Materials Required:
Approximately 6,000 sq. ft. of Armstrong #736 Cortega - See Enclosure #2a.

Approximately 900 sq. ft. of Armstrong 24" x 48" x 5/8" Cortega Minaboard - if extra is accepted - see Enclosure #2b.

3. Job: New Jersey College of Medicine & Dentistry
Location: Newark, New Jersey
General Contractor: Frank Briscoe Company, Inc.
Approximate Shipping Date: 6 to 8 weeks for replacing damaged tile.
Materials Required:
A.T.S. - See Enclosure #3a.
Minatone Classic with vinyl ove :pray (insurance claim) - See Enclosure #3b.
Minaboard Classic 24" x 48" x 5/8" - See Enclosure #3c.

4. Job: St. Agnes Hospital
Location: White Plains, New York
General Contractor: Polera Building Corp.
Approximate Shipping Date: June to October 1976
Materials Required:
80,400 sq. ft. #755B fissured 2' x 4' x 5/8" at $.17/sq. ft.
12,460 sq. ft. #767B vinyl overspray 2' x 4' fissured with acrylic overspray (Type C) at $.19/sq. ft.
1,484 sq. ft. Ceramaguard 2' x 4'
7,700 sq. ft. Fissured 12" x 12"
See Enclosure #4a.

5. Job: Roosevelt School
Location: Yonkers, New York
Owner: Yonkers Board of Education
Approximate Shipping Date: September to December 1976
Materials Required:
8,000 sq. ft. #755B fissured board 24" x 48" - See Enclosure #5a.

340 a

6. Job: Texaco Headquarters
Location: Harrison, New York
General Contractor: Tishman Realty & Construction Co., Inc.
Approximate Shipping Date: June 1, 1976 to December 1, 1976
Materials Required:
502,000 sq. ft. AGT backing fissured at $.42 sq. ft. #592 (As Approved)
218,267 sq. ft. ATS bar (16' long) #975 1-1/2"
13,641 couplings B989
44,000 clips 1-1/2" channel B986
69,000 36" T splines B983
135,800 24" T splines B979
6 Hook Knives B988
$108,497. less 10% per Richard C. Wiley
See Enclosures #6a, #6b and #6c.

7. Job: Lederle Laboratories Cafeteria
Location: Pearl River, New York
Owner: American Cyanamid Company
Approximate Shipping Date: April 15, 1976 to May 30, 1976
Materials Required:
4,000 sq. ft. 12" x 24" Sanserra (some 12" x 12") #572 at $.46/sq. ft.
2,000 ft. ATS bar B975 at $.22
200 couplings B989 at $.095
500 1-1/2" clips A986 at $.075
1,000 24" ATS T splines B979 at $.18
See Enclosure #7a.

8. Job: City College of New York
Location: New York, New York
General Contractor: Carlin-Atlas
Approximate Shipping Date: Job suspended indefinitely by the Dormitory Authority.
Materials Required:
350,000 sq. ft. #527 at $.305 (Special)
Our P.O. #0630, Armstrong's Acknowledgment 11/6/74 Req. #21181
See Enclosure #8a.

9. Job: Utility Wing - Gore Facility Building
Location: Pomona, New York
General Contractor: Gorlin-Okun, Inc.
Approximate Shipping Date: Second Half of 1976
Materials Required:
4,000 sq. ft. #602 Ceramaguard at $.31
14,000 sq. ft. #895 fissured firerated $.17
Our P. O. #5090 dated 7/18/74, Armstrong Req. #20541
See Enclosure #9a.

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10. Additional orders that have been accepted:

Our Order #2198 dated 4/5/76 - 31 cartons #758 Classic Minaboard 2' x 4' x 5/8" at $.17

Our Order #2334 dated 3/29/76 for 300 cartons #552 12" x 12" x 3/4" fissured B.E. and 100 cartons #554 12" x 12" x 3/4" fissured S.E.

We wish to make clear that, not withstanding anything we have said in this letter, we do not accept the propriety or the validity of your termination of our right to distribute Armstrong products as set forth in your letter of March 19, 1976. Our furnishing to you here of the information you asked for as to our outstanding commitments for Armstrong products is without prejudice to, and we expressly reserve, all our rights to challenge your termination of our distributorship and to avail ourselves of all legal remedies we deem appropriate to protect our company's interest and to recover all damages your action shall cause us.

Very truly yours,

JACOBSON & COMPANY, INC.

John D. Jacobson
President

JDJ:mo
Enclosures

CC: Joseph L. Fishman

JOB: HERBERT H. LEHMAN COLLEGE, COMPLEX I

BRONX, N.Y.

Armstrong price quote dated 4/25/75.

Travertone Sanserra K2C2 (long edges keyed), 12×23×3/4"

Price = $.395/ϕ to 6/30/75
= .415/ϕ to 12/31/75
= .445/ϕ to 6/30/76
= .535/ϕ to 12/31/76

Quantity = 56,000 S.F. (Armstrong quoted for 80,000 ϕ).

Travertone Sanserra, 12×12×3/4" K4C4

Price = $0.40/ϕ for 1976 } per (A) letter dd. 4/11/74
= 0.44/ϕ for 1977 } attached.

Quantity = 7,200 S.F. only.

NOTE: THIS JOB IS NOW SUSPENDED INDEFINITELY

THE ABOVE ORDERS ARE SUBJECT TO TH

PROJECT BEING RESUMED.

TO

Jacobson and Company, Inc.

1079 East Grand St.

Elizabeth, NJ 07201

WILL ADVISE

DD	DMN	DD	DMN	DAY CODE	DIV CODE	SO NO.	CUSTOMER PART
NY 029				0	C	15	

Armstrong CORK COMPANY
LANCASTER, PA. 17604
BUILDING PRODUCTS DIVISION

343

DESTINATION	SECOND STOP	FIRST STOP	PAGE
xxxx			1 of 2

2/10th

TERMS: 1/2nd 10th ADF N/2nd 30th

PPD. X(P) VIA Truck

SHIP FROM: Beaver Falls

F.O.B.: CL/FA

DESCRIPTION	ITEM NO.	ORDERED QUANTITY CTNS. ETC.	ORDERED QUANTITY PRICING QTY.	PRICE & UNIT	% DISC
Nominal 1 x 2 x 3/4" semi-concealed K2C2					
long sides Sanserra Travertone -			80,000 SF	.395/sf	
Price per J. B. Bane to R. A. Baram 12/4/74 as per attached					
$ .395/sf until 6/30/75					
$ .415/sf until 12/31/75					
$ .445/sf until 6/30/76					
$ .535/sf until 12/31/76					
Mark bill of lading: Trucker to call customer 24 hours prior to					
delivery 201/355-9060					
Job: Lehman College - Complex I					

John Higgins
I don't know who ordered this.
Please advise on quantity
and price.
QRW

PLANT - SEND B/L COPY WITH # 5
BILLING - SEND B/L WITH INVOICE

SUBJECT TO SELLER'S APPLICABLE PRICES, CREDIT, TERMS AND CONDITIONS OF SALE. SEE REVERSE SIDE HEREOF

ENTERED

INITIALS	DATE
jb	4/25/75

10 71

CUSTOMER A

Exhibit J Annexed to Affidavit of Phillip W. Unger

Territorial Analysis, January 1975 by Paul R. Langan

Paul R. Langan

TERRITORIAL ANALYSIS

January 1975

Saddle Brook Territory

The slowdown of the construction industry in New Jersey has grown worse through 1974 and the situation seems to be worsening prospects for 1975. The unemployment figures for New Jersey are running well ahead of the national average. The relationship of our customers to the business is not going to help much. The major shake-up has been with Jacobson & Company.

Jacobson & Company has been totally re-organized. They no longer are actively bidding work out of Elizabeth. The company is still controlled by the personnel in New York City; John Jacobson, President, Vice President, Neal Jacobson; and Sam Shanzer, Vice President. What they have decided is to terminate their Plainview, New York Operation, and drastically cut back personnel in Elizabeth. They no longer do any estimating and bidding out of Elizabeth branch, that is handled by the New York Office. It is obvious that they had to cut back much of their overhead in order to continue in this business. This situation came about because of the very aggressive bidding tactics by Sloan Acoustics. By cutting back their personnel they have also abandoned the promotional aspect of the business, seeing as though they have no one left to promote. All their purchasing out of Elizabeth is done now by Bob Wagner, formally part of the S.E.C. Team. Richard Stankie has left Jacobson to accept a position with Special Section in New York, and Sam Epstein has also departed for another position. Pat O'Malley is the only other individual still there in some capacity, as more of construction manager, Al Sweetwood, Charlie Groomes, Jack Dunigan and Abe Conklin have all left for greener pastures.

The other experiment Jacobson is trying, is to imitate the Harry Rich - ISD Operation. Phil Miller is going to handle this but does not seem very enthusiastic about it. I personally do not feel they will be successful at this, because they're really not equipt, as Harry Rich is to handle the operation.

Once Jacobson does consolidate their office in Elizabeth there is a possibility of recovery. But at this time they are still in the state of flux and confusion. In making this transition they have apparently taken the only avenue available to them. Bad business deals and too many bad jobs have forced them into this decision.

BEST COPY AVAILABLE

TERRITORIAL ANALYSIS (continued)

January 1975

Saddle Brook Territory

I am beginning to notice that Harry Rich Affiliates has been relying more and more upon the profitability of ISD. They have continued in the recent months to lose jobs when confronted with competitive bidding from Sloan Acoustics. Henry Greenstein's attitude is that Sloan can have the jobs if they bid that "ridiculously". He appears to be content to push material out of ISD with the overhead that Henry has, he has great difficulty in remaining competitive with a leaner organization like Sloan Acoustics.

Sloan Acoustics has replaced Harry Rich Affiliates and Jacobson as the number one acoustical contractor in New Jersey. It will be a challenge to write much of the business with Sloan, being that Celotex has made a significant effort to buy the business from Sloan, with freight deals and selling off list.

The greatest change with A & M is their active promotion of Soundsoak. They have come to realize that this is a money making item for them.

Exhibit K Annexed to Affidavit of Phillip W. Unger

Spring 1975 Memorandum by Paul R. Langan Entitled "Long and Short Range Plan New Jersey"

P. R. Langan
Long and Short Range Plan
New Jersey

346 a

My three year plan for increasing my business 50%, will be based upon some key words. The year 1976 should be a year for promotion and exposure. It is this year that I feel construction will start to come back in New Jersey. Because of this, I think that it is essential to concentrate on the educational side of selling, make everyone familiar with Armstrong products, not just Armstrong.

There's no doubt that 1977 will be the year that New Jersey begins to ship the volume and dollars again, but I'm also looking forward to a strong expansion in the market. But not expansion for the simple sake of expansion, profitable growth might seem more appropriate. Growth into yet untapped areas, or redirection of energies toward more productive areas, or even the addition of salesmen to cover more extensively certain counties.

The hope is that a close working relationship with contractors and a careful record of their activities will help the contractors perform in the marketplace with the greatest efficiency.

Any plan to increase must revolve around an efficient means of distribution. Our distribution system is committed to the contractor at this point. Whether or not we will enter wholesaling is a question I can't answer at this time. If we do enter a wholesale means of distribution, I would suggest that Harry Rich Affiliates be designated our New Jersey wholesaler. At this time, they are best equipped to handle the line most efficiently.

However, I can't develop a plan for the next three years based on an assumption that Lancaster will make a policy change. My plan is based on contractor distribution. I do not feel that to increase business we must increase contractors. We don't have to sell every contractor on the marketplace. But, we must get and strive for, good committment from the one's I sell.

First of all, I want to start out with the proper contractors. There should be no need in duplicating coverage or function. I think that four contractors will be sufficient, but I want to delete any possible non-performers. I will, therefore, suggest that Jacobson & Co. be dropped by Armstrong. These people are very confused in regards to the future of their business in New Jersey. I think that they're attempting to move in too many directions at the same time. A dry wall business, a wholesaling business, a bid oriented firm and so on. What they were to Armstrong in the past, as far as an active promotional firm with the ability to close a job, they no longer are. They have no contractor salesmen in New Jersey; where they once had many (in Southern Jersey) where they once were a active firm, they play little or no role in the market. With all of these new products to promote, one thing I don't need is another bid firm, one that has trouble closing jobs. When we fulfill our committments on our present jobs, our relationship should be terminated.

To take their place, I intend to add a contractor that would concentrate on the Southern and Middle portions of New Jersey. This is the area I perceive the greatest construction growth in the State. I believe it is beginning to move from the Newark area and the very populated Northern areas of the State. The construction of the interstate highway system I287, I80, I78, and N.J. Turnpike make easy access to Southern and Western parts of the State.

The new contractor in the State, Claremont Acoustics should help in developing these areas, not only in physical job by job coverage, but also on the promotional end. What is sorely needed in this area, is a selling force, not a single Armstrong salesman. The addition of this contractor with 6 salesmen should help develop such a force.

This addition is a major part of my plan. First off, we are getting in on the ground floor with an acoustical contractor that is relatively new to acoustics, and we can get 100% committment from them. Secondly, they are also dry-wall contractors, making not only the combination bid of value, but also the fact that many areas that have little in acoustics are large in dry-wall. This will give us some added coverage in an area that we haven't had before (a possible opportunity for more of our specialty items, Second-look, Boldface, Grandshire, Designer Series?). Lastly, these people have maintenance contracts with large firms in Jersey. They are already involved with the renovation decision-makers. We've already got our foot in the door of the renovation market.

Now the problem will be educating this new firm to make the opportunity pay-off. It will take, on my part, a great deal of time and effort to orient this contractor not toward closing the jobs but helping sell our product and his. I intend to hold educational meetings on a monthly basis to introduce and continually review and update our product line. These meetings are not only to review products but also to target jobs, follow progress and discuss achievements. I wish to create a selling force. Salesmen are definitely the key to promotion.

My intentions are to direct this firm toward Monmouth, Ocean, Warren, Mercer and other Southern counties. It is here that Armstrong is the weakest. But, it is also here that competition with larger firms is not as strong. This is where they should be able to establish themselves. I do not expect miracles the first year, but I do expect, with their present backlog, the switch from Jacobson to Claremont should mean a 5% - 10% rise in what I would have done with Jacobson.

The re-orientation of the sales force at Harry Rich Affiliates will be my next task. I don't believe that this is a lot cause. The thing that must be kept in mind, is that while other firms have come and gone over the years, Harry Rich Affiliates has consistently produced volume and dollars.

Part of my plan, is to travel on a regular basis with the established sales force. This effort would be directed not only at the architectural level, but also at owners, and General Contractors. My goal is to travel with a salesman once every month. In this we can make contacts and leads together. It will not only enhance a working relationship, but also help me to instill the benefits of talking Designer Series, Soundsoak, Boldface, Second-look, etc. with people.

The other approach is to add incentives and competition to selling our new products. One approach I intend to take, is to hold competition, to see who can successfully sell or close jobs (in terms of dollars) with our new products. It would be run on a quarterly basis, the prize being, a basket of cheer, tickets to a show or something similar. It's at least an idea that may change the status quo and add that little extra incentive to perform. They have nothing to lose by it.

Harry Rich Affiliates is also participating in our renovation program. At this point, they not only have the sales force to run with it, but also the established customer firms and contacts. The organization is capable of an installation or providing service for simple re-sale. In this case, renovation work may be the key for stocking the Designer Series, or Soundsoak. When this renovation promotion does pay off, we will see it not only in terms of direct sales but also in stocking and merchandising. By the end of 1976, I can foresee Harry Rich Affiliates keeping a healthy stock of all our new products. This alone can easily account for a $100,000 increase for 1976 over 1975.

But throughout 1976 I am going to keep on top of the stock situation. For every two carloads of Travertone or Minaboard, I'll be expecting to see one carload of new products. The way to do this is to maintain direct - mailings and open-house functions and to continue promoting. After all, it's dollars for the contractor.

My promotional plans with A & M Contracting will be designed toward moving Soundsoak wall panels. They have become very efficient at installing them and don't mind taking a slim mark-up once in a while. We are going to approach the promotion in two ways. One, we are embarking upon a direct mailing campaign. We are using standard Soundsoak literature, plus our architectural ad reprints with a letter giving outline information on uses and benefits leaving the opportunity open for sample and swatch request. Soon after, we're going to start a selling blitz, directed at the same industrial and office parks we've already mailed to.

It's an idea for making a direct sale. The other aspect is that we're concentrating on an area, potentially more interested in the product, (IBM, Burroughs, Xerox, Victaulic Schering Corp., all firms with computer areas, found within the office parks) and also in a more concentrated area.

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In a time when new construction is on the decline, Soundsoak sales are agood way of continuing to maintain strong sales volume. It's a product you can see immediate results from., for it is not tied that tightly to new construction.

For a firm such as A & M Contracting, it is a means of increasing sales volume without having to geographically expand the territory they would prefer concentrating on. It is also an opportunity for me to get right before the individual that makes the decision and by material. I can get the order right from him.

My last contractor, Sloan Acoustics, is a firm that almost purely bid oriented. With only two or three salesmen covering all of New Jersey, they can't (in their estimation) take the time to reach and promote with their customers and architects. But, I believe that with the market the way it is now, at least one of my contractors must be purely bid oriented. I must have one contractor I can usually count on to out and low-ball a shopping center or speculative office building. I must at this time keep that area of my market well covered so that the low overhead small acoustical contractor doesn't take what small work there is around.

I do believe however that it is time we begin making price concessions to these people. Looking over the off-list sales so far this year, I believe that working with Harry Rich has been something of a mistake in terms of future considerations. This possible move downward in this instance, would merely bring us closer in line with our competitors in this area. But in terms of increased business, I believe we would see a substantial increase for the coming year and the ones to follow. If we intend to move off-list to meet the competition, let's do it on a more consistent basis with the customer we expect to see growing in the contracting business.

There are other certain things that must be done in order to look for and justify expansion in 1977. Growth in terms of contractor effort will take some convincing. But in order to be assured of real growth over the next three years, Imust insure that every job bidding is covered and not just bid for the sake of throwing a number in. I intend to establish a monthly bid list which will be circulated to the sales for in each office stating the target jobs to be bid. Then, not only follow up on the jobs, but issure a monthly report. A report on what jobs have bid, what jobs the particular firm bid, and what they hav followed up on and closed. The idea is to show how much work each firm goes after, what percentage of the work they close; where and what kind of work. Then, sit down each month and look at the statistics. There wil of course be a time- lag, but this might help illustrate to each of them where their efforts are most fruitful. It may also be possible to project the added volume they could gain by greater concentration on different ares or job types. By 1977 this will help me to point out with each of them strengths, weaknesses, and how they may benefit by an additional salesman somewhere, or change their emphasis on a particular territory. Before setting budgets for that year, I will hold meetings with each customer in an effort to influence their planning for the coming year.

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In keeping with the theme of expansion for 1977, I plan on making a case for the inclusion of at least Mercer County, and possibly Burlington County (depending upon how strong an influence my contractors develop there) into my territory. For the New York office, this would not simply mean the rearrangement of territorial responsibility. It would be an actual growth in dollar volume that the Philadelphia office is currently responsible for.

At this point, I do not believe that Armstrong has as strong an influence there as it would like. I am convinced that the development of Claremont Dry Wall and Ceilings as an Armstrong contractor will be a major factor in attaining this goal. This contractor is geographically located very near Mercer County, and already covers that area with consistency. It will be very difficult to me, if I can prove my contractors are getting the bulk of the work in this area. I'll not only have a reason to ask for this area to be included in my territory, but the right to demand its inclusion.

I believe that Trenton and Princeton are the key cities in this area. I intend to insure that my contractors are giving us good promotional efforts in both cities, both on the owner, General Contractor level, and Architectural level. If I can show this the move becomes merely logical.

It is fact that a good number of architects in Princeton and Trenton, do a substantial portion of their portion of their work in my territory. My objective is going to be to make both my customers' and my presence felt on these jobs. I have in the past, found that I too often have little control over what is specified on these particular jobs. I intend to change that in the coming year.

Promotion on the architectural side of the business is another area I intend to concentrate on . It is of course, the most important thing, to see the large firms with the bulk of the work. Seeing an architect on a specific job is usually the best way of getting his attention to what your saying or promoting. This is to me the most efficient way of spending my time.

But on the other hand, many of the smaller architects with smaller size jobs, are interested in new products and information. I don't want to spend all of my time seeing these people, but I do want to keep in touch with them, and keep them up to date on our products. The way I'm going to approach this is by my own direct mailing campaign, that would be on more of a personal basis, rather that a corporate one. The number of items that we have to sell, lends itself to this type of idea.

The mailings would involve a couple of things. It would include the standard literature piece, one of our ad-reprints, a form letter on the product, its uses and benefits, and of course, my card in case he wished to contact me for further information on this or anything else. Each month information on a different product could be mailed out. Armashield, Armatuff, Bolface, Designer Series, Luminaire, Second-look, Soundsoak, or whatever else. I feel that this is a good method of keeping personal contact with many firms, without having to make a good deal of time for personal visits. I don't expect the leads to comr pouring in, but I am confident of getting a good response on many items.

Even in large architectural firms the problem of reaching everyone stil remains. I plan on targeting some large architectural firms as those I want to hold promotional meetings for, at least once each year. Those firms included would be the Grad Partnership, Newark; Harsen and Johns, Tenafly; Eckert and Gatarz, South Brunswick; Phillips - Kaufmann, Morristown; and Uniplan, Princeton. These will be luncheon meetings, either box lunch at the architect's office, or possibly at the Saddle Brook office. I hope to make it a process of formal invitations, rather than merely setting up a date and asking people to attend. The goal would be initially to familiarize all involved with the many diverse produ s we have to offer. I will shoot for January 1976 as a target d e to initiate these meetings. After the first promotion, I would expect to get at least one more meeting with each firm.

In regards to actual dollar volume, one solution to increasing the total volume, is to increase the value of what I sell. Luminaire jobs will give me the increased dollar per square foot. My thinking is to build consistent volume of C60/30 Luminaire for schools. I've got to reach the right person on this, and it is not necessarily the the architect. I believe that it is the individual school board. In New Jersey, the lighting requirements for schools are very lenient. The only objective is to maintain fifty footcandles. I think the benifits of C60/30 should be brought to the attention of many school boards. There appears to be a good possibility of creating the desire for the system.

Part of my plan will be the education of the school board planners to the benefits of C60/30. I think theres a story to tell as far as glare reduction and lighting effectiveness. I intend to begin a series of lighting and Luminaire seminars. These meetings would be directed specifically at school boards and, architects that do the bulk of the school work in the state. The idea is to have this co-sponsored with a contractor (thereby dividing the costs) and developing one particular growth region to experiment with, gauging response and effectiveness. If the effort were to pay off with some bona-fide response and interest, I will continue the program in different areas of the state. If there is no response, I will take my case before each individual board on a job by job basis. But this, in my opinion has become the starting point.

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Much of the promotional ideas I've already mentioned concern a planning, bidding, and closing process. However, we do have some products that lend themselves more to stright sale remodeling. I am speaking specifically about Soundsoak. I've also spoken about an idea to move Soundsoak panels with A & M Contracting. But I think I've come up with an idea to move screens (I may not have come up with the idea but have found the opportunity). My promotion and distribution efforts will no longer be merely contingent upon the acoustical contractor. It is obvious by now that the means of distribution for Soundsoak screens is more than inadequate. In most of my sales they have either been stumbled upon by the contractor, or given to him by me. Very rarely have I seen them promote and close a sale with screens. The problem lies in effectively reaching the right person. In screen sales the right person won't normally go to a contractor. In most cases owners would go to office furniture stores, where I've found the cost of our screens not extremely competitive. Yet, many times the owner is looking to totally renovate, but simply remodel his office space. By the time the owner is in contact with the contractor, his space has been redesigned. The owner must be directed toward our screens when he is first looking to remodel. It is then that the idea for the screens and panels can be shaped. This is where interior decorators and designers come into the picture.

In my territory, I've found some firms that design, supply, and install interior furnishings; drapery, carpeting, flooring, wallpaper, etc. I am at the moment attempting to finalize an arrangement by which an interior designer working with such a firm, is furnishing some screens and interior finishes to a company. It is I might add, a type of open bid procedure. When and if this is successfully completed, we intend to continue the arrangement buys screens and panels to promote and display. I am securing an agreement with one of my contractors, probably Harry Rich Affiliates, to work with a modest 10% mark-up for direct shipment, and 15% when it must be handled. By the end of six months, I expect the sale of at least 75 screens. I am confident that this is the opportunity to open the market for consistent orders. It is a much better outlet for the screens. Contractors oriented towards new construction are not really capable of providing consistent volume. The interior designer also has the opportunity to make some money for they can then become the single source of supply. Here is an opportunity for an outlet outside the construction business for people not only looking for complete renovations, but maybe just new office furnishings. If this arrangement begins to pay-off, I will begin setting up small outlets such as this using the same criteria. This one happens to be in Union, the ones to follow next year will probably be located in southern Jersey and the other in Bergen County. The idea is to keep this with small firms, not ones where our screens may not be as competitive.

These ideas are intended to be the basics of my plan over the next three years. The forecast for 1975 seems more than bleak, its beginning to appear disasterous for the second half. The construction projects are just not there. I foresee the first half of 1976 much the same way. If I can project into next year looking at what's on the drafting boards this year, I can't see very much happening.

1977 is the year that I see my promotional efforts paying off. I look to that year as one in which I will concentrate on insuring better market penetration on the part of my contractors. I'm confident that the issuing of monthly reports to each contractor will play an important role in this . At least this will help in deciding what direction or course of action to take.

I believe that by 1977, Sloan Acoustics will be by far the dominant contractor in the market. I want to concentrate my efforts far more with them, than any other contractor. These will be the people getting the work over the next few years, and I believe that if we are going to play ball on prices it should be with these people, even if it takes abetter extention of credit in the beginning.

By 1977 or '78 two distinct courses should develop for us to take. One route is the wholesale route, the other to remain committed to the contractor. Either way we go Harry Rich Affiliates will play the major role. At this point in time they seem to be specializing in certain renovation and re-sale accounts. Their contracting business appearsto be slowly deteriorating. In 1977, when many new construction projects will be bidding, I don't see Harry Rich Affiliates as being very competitive on closing jobs. In order to do so they would have to make some very major changes in the structure of their organization. They appear to be placing a growing emphasis on their wholesaling operation, which very definitly payed off for them. At by 1978 we will have to make some decision as to where we stand with them, wholesaler, or contractor.

By 1977, we should have a direction in mind. If the answer is wholesaling, we will then be able to reach the small contractors we've never reached before. We can open our line up to everyone. The question becomes what do we have to gain by no longer restricting ourselves? If the tendency I've begin to see emerge, continues, manufactures on the wholesale level will be shopped against one another for the best deal or bargain on their commodity items. We may no longer be competing on price list levels, but on functional dicount levels.

Regardless of which route we decide to take, these changes are going to develop. If we do not go into wholesaling with Harry Rich, our relatio with them will deteriorate. I therefore suggest that we continue to push for a stronger relationship with Sloan Acoustics, making them our target firm. I intend to maintain relationships with three smaller firms, to conentrate on specific areas,promoting and closing smaller work.

If on the other hand, the wholesaling route develops into the path to greater volume, I see no need to abandon my efforts towards solidifying relationships Sloan, A & M, and Claremont. The only difference being the fact that HarryRich would have to develop accounts and business to the point that they could offset the prospected loss of business to the other three customers.

The road to a volume increase of 50% by 1978, will have to take one path or the other.

Exhibit L Annexed to Affidavit of Phillip W. Unger

Memorandum from Richard C. Wiley to Phillip W. Unger, Dated April 9, 1976 and Territory Analysis Supplement—1976

INTER/OFFICE COMMUNICATION

Armstrong CORK COMPANY

To P. W. Unger, Arch Clg Sys Div, Lancaster

April 9, 1976

From R. C. Wiley, Arch Clg Sys Div, New York

Subject Northeastern Regional Office
Territory Analysis
1975 Supplement

Attached are our Individual 1975 Territory Analysis Supplements as you requested.

Also, we call your attention to Langan's and Baram's report and their comments on Jacobson & Company. While you are getting these reports in April they were actually written and typed up in early February. You will want to copy the pertinent pages or the whole thing and get a copy up to Legal.

Dick

MAK

Enc.

Please — Dr. Spice's memo re. J.

FORM 1501 4-71

NO ENVELOPE REQUIRED

TERRITORY ANALYSIS SUPPLEMENT - 1976

I. The Market

There have been several major changes in the New York City territory since last year. Two, in fact, are very significant.

The first major change is the virtual halt to construction in the public sector. Due to the fiscal problems of New York City and New York State numerous construction projects of a public works nature have either been cancelled or halted in various stages of construction - - - from 50% to 75% complete. They include Public Schools, high schools, colleges, libraries, etc. The dollar figure on these projects is staggering. About the only public dollars available for new construction is in the health care area and even there the money seems to be drying up as the wheel of construction grinds to a halt. The only work we will see in this sector, unless "new" money is found will be in the area of renovation - - - and even there the dollars are hard to find.

In the private sector the market has also changed but maybe not so drastically. I would not like to be a structural steel salesman at this moment in New York City because new construction is probably overbuilt by some 30,000,000 square feet depending on whom you believe. Nevertheless, this 30,000,000 square feet represents footage that must be installed eventually. In addition, as older buildings become more and more in disarray they will need renovating so perhaps things are not all that bad. The name of the game in the public sector has changed however from new, high-rise construction to renovation - - - and I think we have the products and contractor personnel to meet this new challenge.

II Contractor Personnel

We have not added any local New York City contractors over the past year. However, there has definitely been a change in their efforts over a years' time.

First off, Associated Ceilings came through with a good performance - - - what we expected of them - - - of $132,479 which is slightly over their budget of $130,000 that I set for them last year. More importantly, they "grew" in '75 by adding an estimator and "promoting" a few jobs.

Scully gave us one hell of a good year. They improved 13% over 1975 and came in just under their assigned task of $650,000. They have a couple of major jobs and, very importantly, do a real good over the counter volume. In fact, since I started handling them, I have become amazed at all the material Jim Scully runs over the counter - - - particularly, goodies like Soundsoak and Antique Glass.

Superior fell off 20% in 1975. I see a possible problem here in that although everyone in the company is accessible and approachable, their main man, owner-President Jim McGuigan is virtually never available to anyone, including his own personnel.

National, although falling off 4%, still had a respectable year. They lost a member of their management team in January of 1975 when Henry Stuhr retired. The firm is now run by Dan Alesio and Joe Lynch with Don Lowes a minor partner acting as the new purchasing agent. Jack Teahan is also a minor owner. The rest of the staff is Bill Brooks and Dennis Duncan. National is still a good solid Armstrong contractor despite their anti feelings toward our Colomar tile and lack of promotion of our materials.

BEST COPY AVAILABLE

U.S.G. and Conrad have been calling on them with little success. Our price and service is still good. Nevertheless, in two years we have, with higher prices, gone from $537,000 in 1973 to $407,000 in 1975. That is a slippage of $130,000.

Phillips - nice guys but they are tricky and foxy. Bob Phillips wants to know everything about everybody but talks little about his activities other than to complain about something. Jim Phillips is a gentleman and very knowledgeable. All in all they are decent people but you can't fully trust them. the best guy in the firm is Ted Phillips who is young, aggressive, sale-oriented, promotion minded and amenable to suggestion. Also, Phillips, when they hear of a "good deal" will go along with it. As a result they purchased $10,902 of Soundsoak. How many other contractors could say 13% of their (sic) purchases was Soundsoak. Of course, we are dealing with nearly nothing on '75 purchases.

I see them much stronger in 1976 with Broadway Plaza the main factor.

Tom Maguire is always very helpful, as usual.

Since Phillips 1976 strength was Olympic Tower, it looks like every other year they are doing a fair job of it.

Jacobson was nowhere in 1975. Their entire organization was decimated. Their Long Island operation died with the departure of Hank Eckstein. Their New York staff was cut to the partners and 3 estimators.

I see Jacobson as a very small factor - - - like a James A. Phillips - - - in the future - - - but they will survive.

John did open a material distribution center in Elizabeth in 1975 that has shown some spark of late under the direction of Phil Miller. Warren Watts was named a Vice President of the firm in 1975.

Circle - we are having some problems with Circle in that they are trying to put their price on our goods. Jim Smith remains the key purchasing influence. Harry Grey is the day-to-day purchasing agent. Larry Barden has been let go. Circle has pulled in their belts by retrenching to a new location at Baldwin Street in the Bronx - - - a sign of the times for them. They do not have a very large backlog. Many people have been fired. They are difficult to deal with at times and yet they still have that great ability of coming up with the big job. Don't underestimate them. They are still No. 1 but need some help. They have been shopping other manufacturers of late - - - namely U.S.G. They are still pretty solid Armstrong although I'd be careful how hard we push them. Surprisingly, their purchases were up 37% last year from 1974 to $[illegible]. This is, of course, below their 1973 high of $1,23[illegible].23[illegible]. Nevertheless, not a figure to be sneered at.

III. Competitive Contractors

Gilbert Phillips for awhile was making tremendous waves in our marketplace. Now, it appears he may no longer be a large factor. He is having grave business financial problems. His staff has been cut - - - his main supplier (U.S.G.) has liened one of his jobs for non-payment. Quinn, Nolan, etc. continue to take their share of work. [illegible] is in financial trouble. Smaller contractors are doing some renovation work but not making too great an inroad vs. our "big 7".

IV. Architects

Some of the smaller architects (list available on request) and Interior Designers are doing quite a bit of renovation work with the large firms laying off personnel.

Ken Ross New York City Interior Designer and Durry Wilke New York City Interior Designer are good Sounisoak users.

SOM - user of Antique Glass, RBB continues to spec. All Armstrong, etc. stronger and stronger inroads with architects and designers are being made.

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Exhibit M Annexed to Affidavit of Phillip W. Unger

Territory Analysis Up-Date by Paul R. Langan

TERRITORY ANALYSIS UP-DATE 360 a

P. R. LANGAN

Perhaps the most important in the New Jersey territory over the past year, has been the steep decline in business opportunity. Many of the changes that have taken place, reflect this overall developments.

The most drastic change in our contractors organization has taken place at Jacobson & Company. They are no longer actively bidding out of their Elizabeth office, and this has resulted in an empty backlog for 1976. Hopefully they will be making some sort of comeback in 1976. They plan on moving all the company operations from New York into the Elizabeth office by this summer. John Jacobson has made it a company policy to bid only on "big work". (which is a problem in itself; there is no "big work") In keeping with this idea, they have issued pink slips to the remaining salesmen from the Elizabeth office. Pat O'Malley left in December '75 (Now with Span-Coustic in Trenton) and Bob Wagner will be officially terminated as of February 29, 1976. They have joined with, Sam Epstein Dick Starkie & Jack Dunigan as ex-Jacobson employees in New Jersey during the past year. Phil Miller is the only salesman left and he has been working exclusively as administrator of Jacobson Supply Division. This has been Jacobson's version of Harry Rich's I.S.D. operation. They are operating with a functional discount from Conwed, but rely very heavily on the re-sale of Armstrong material for their sales volume. Due to the fact that their last ceiling job is just winding up, all purchases of Armstrong will be used to stock this operation. As of this writing, Jacobson is not a factor among New Jersey ceiling contractors. They have not closed a job in the last year and are no longer relied upon by local general contractors for prices.

At Sloan Acoustics, there have been some personnel changes. Mark Fowler, who had been handling purchasing for the firm was fired in May of '75. He was replaced by Carmen Santillo who had been estimating Dry Wall for Germinario Acoustics. He had been able to add some organization to the firm until he was moved from his position as purchasing agent to superintendent at the A T & T Long Lines job. Mark Fowler was let go, because of the repeated problems in coordinating and managing, and performing the numerous amount of jobs they had under contract. It's my feeling that he was merely the scapegoat for the lack of management that this firm continues to suffer from. The other major change is that Jim Bush, the salesman for the southern part of the state, has formed his own company, Acoustical Specialties, Inc. This has been a severe blow to Sloan Acoustics. The southern portion of the state has been vacant since January 1st and at this point they have not made arrangements to replace him. It appears as though he'll be stiff competition for Sloan in the south. He has maintained his contact with his general contractors customers and has already been awarded some contracts that would have gone to Sloan.

The firm is no longer taking the high percentage of available work as they did in 1973 and 1974. Pete Shanley has given me some indication that Carmen will be going after some dry wall to make up for the loss of volume in ceilings. I feel this to be a mistake. They still have overcome their problems of lack of management and communication.

Since Sloan is no longer gobbling up the percentage of ceiling contracts that they have been, someone else is. That company is Harry Rich Affiliates. During this past year, they have become much more aggressive in their pursuit of ceiling contracts. The change in attitude appeared to be developing early in 1975, but one event of last summer seems to have ignited the spark

in their hard drive to get work. Harry Rich sold his holdings in the business.to the employees.

The entire turnover is much too detailed to go into, and I don't know all the angles, but the basic idea was so Harry could get his money out without having high tax rates to cope with. The new organization has a new power structure. Leslie Kovac is now the President, Henry Greenstein the Executive Vice President, Danny Gold the Secretary Treasurer and Senior Vice President, and Manny Nagle has been eased out of the decision making to become Chairman of the Board. The rest of the employees also have stock in company and share in the profits. This has helped ease a lot of dissension that developed between Harry Rich sales personnel and I. S. D. The salesmen benefit from the profitability of the "whole" organization.

I. S. D. has continued to show a profit for the Rich organization. They have now taken on the Celotex line for the Delran operation, and have continued to service many of the medium size and smaller contractors throughout the state. Many of the Harry Rich purchases of Travertone have gone to stock I. S. D. and their sales.

The Harry Rich organization is now handling our Industrial Noise Products. Mark Fowler (formally with Sloan) is running this operation, but it has been slow to get off the ground. No companies appear to be willing to invest any money at this time.

The major change at A & M Contracting has been their move into larger offices with much greater warehouse facilities. This was a definite plus for this firm. They now have the capacity for doing more volume. Other than that, they have continued to be our most consistent and loyal customer.

We added a new contractor in Bedminster, New Jersey, Claremont Wall Systems. This firm bids work mostly in Mercer County and the Southern and Western counties. They are an affiliate of Claremont Painting and Decorating which has been an established painting contractor for years. John Jasterback, the Vice President of the company, is in charge of Dry Wall and acoustics. The President is Dominick Sciaretta and the Treasurer, Nick Cirignano are two important factors in the business. Although neither plays a very active role in ceilings, you are extremely aware that they hold the purse strings. The ceilings business has three sales estimators (George Danielson, Bob Donald & Bob Scamorza), none with strong experience in acoustics. The basic reason is, they are dry wall people now attempting to develop a strong ceilings business. They have done some large dry wall jobs, A T & T in Basking Ridge and Nabisco Global Headquarters. At this point, I am expecting only about $75,000 worth of business in 1976. But there is some definite evidence that we can look to them as having some strong growth potential. They are geographically located in an area where there has been rapid growth in construction over the past few years, and where it appears this trend will continue (they are not more than 5 miles from the two A T & T complexes). The organization itself is very strong and efficiently run. The only drawback is the need for an individual responsible for only ceiling contracts. I am convinced this firm is maybe two or three years from becoming a very strong firm in our distribution system. It is one of the few contractors with strong growth potential.

There have been no major changes in competitive contractors. There has been no strong growth demonstrated by any contractors. Still, many small, very low overhead, organization popping up. Some contractors are on the decline

Most notably, Acoustics, Inc. has become much less aggressive on ceilings, and seems content to concentrate their partition business.

One firm to follow is Acoustical Specialties, Inc., the firm Jim Bush (Sloan Acoustics) has opened up. He has already demonstrated his ability to close work and is located in an area (Red Bank) where we could still use a some coverage by a local contractor.

The wholesale distribution business has continued to develop spurred on by the success of I. S. D. and other wholesalers, and the growing number of very small contractors, more manufacturers have decided to go this route. Conwed has given a functional discount to Jacobson Supply Division in Elizabeth, J. B. Eurell in Hackensack handles and in a strange move, U.S.G. has given its line to O.C.F. Supply in Harrison. As previously mentioned I.S.D. now handles Celotex in Delran. At this stage of the game, there may almost as many wholesalers as there are contractors. Yet, the other manufacturers keep looking to add to their wholesale distribution, merely duplicating their coverage.

When construction starts dropping off sharply, many architectural firms were the first to feel the pinch. The Grad Partnership has suffered through many lay-offs, with very little new work. Merchant, Voorhees, and Rose another large firm in New Brunswick is suffering through the same drought. Most hard hit are those firms that have specialized in schoolwork, as the bottom appears to have dropped out of that market. The only firm that has grown has been Rouse, Dubin & Ventura in Tenafly. This is mainly the result of the transfer of their New York operation to Tenafly.

Along with everyone else, general contractors in New Jersey have had to adapt to the business conditions. There haven't been many bankruptcies but moreso large scale lay-offs have occurred as companies try to trim overhead. Most generals have adapted and are now going after much smaller work,. and bid lists have quadrupled.

Only two developers continue to build and expand. They are Hartz Mountain Industries and Mack Construction both of whom do almost exclusively spec buildings and work most regularly with Harry Rich Affiliates.

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Exhibit N Annexed to Affidavit of Phillip W. Unger

Memorandum from B. N. Caldwell to W. W. Locke,
Dated July 31, 1974 and Enclosures

INTER/OFFICE COMMUNICATION — Armstrong

366 a

To W. W. Locke, Arch Clg Sys Div, Lancaster 7/31/74

From B. N. Caldwell, Arch Clg Sys Div, New York

NOTED R.C.P.

Subject Job Follow-Up Report
Second Quarter, 1974

Bill, our office reported on almost 11,000,000 square feet once again in the second quarter of 1974 as we did in the first quarter of 1974. As an office we are way off our reporting figures as compared to the sametime periods last year. Last year in the second quarter we reported on 18,000,000 square feet which then gave us a total of 38,000,000 square feet reported on the first half of 1973. The first half of 1974 shows not quite 22,000,000 square feet reported. The footage appears not to be available to our contractors to close. Our contractors are closing at the rate of 58% of the work reported on good for 6,289,000 square feet in the second quarter of 1974. My comments on the second quarter, 1974 follow-up by territories folbws:

Bob Havner - Connecticut, Massachusettes. New Hampshire & Maine

Connecticut - Armstrong customers picked up their closing rate this quarter taking 47% of the reported footage. Our new customer Thermal Acoustics lead the pack closing two nice school jobs and a hospital. Thermal people are also remembering that we are in the Soundsoak business getting us some good promotion and three orders. Conn Acoustics picked up this time closing one large school and a couple of small jobs. Central Conn Acoustics and ACMAT still get their share of the work but they did not dominate our customers this quarter as they did the first quarter.

Springfield, MA - Bill Bishop and Company continue to pretty well dominate their trading area closing through the first half of 1974 approximately 40% of the reported work. The other footage reported was closed by 10 other contractors showing Johnson has competition but still handle their market. Johnson has now moved into their new office/warehouse facility which hopefully will allow them to expand their business even more.

Worcester, MA - Kesseli and Morse has closed nothing so far first half of 1974. Our customer were completely blank the first quarter of this year but Pitcher snuck into the Worcester are the second quarter and closed a job to give us one score for the first half 1974. Quality Acoustics and United Blackboard seem to be closing the bulk of the work closing between them 320,000 square feet this reporting period.

New Hampshire - The percentages in New Hampshire are all in our favor. Through the first half of this year our customers have closed 70% of the reported work good for 425,000 square feet. As usual the only type of work we cannot get is the shopping center which Granite State Acoustics handles.

Maine - Our Maine customers were blank the first quarter of this year but recovered the second quarter. Of the 405,000 square feet reported, our customers closed 48% or 195,000 square feet. J. L. Morin Company still is the big competition getting 170,000 square feet this reporting period. Acoustical Products, which is our latest addition in Maine, has already helped our Maine business by shipping a carload of Travertone and a carload of board The bears and moose of Northern Maine must be building new buildings.

Bruce Koehn - New Jersey

New Jersey continues to be strong on closings. Bruce reported on 3,000,000 plus square feet as secured by 19 contractors. Armstrong contractors closed 80% of the reported footage. Through the first half of this year, we have closed 70% of the reported footage good for almost 4,000,000 square feet. Our four New Jersey customers all improved on their first quarter closings with Sloan Acoustics once again, as they have done the previous two quarters, leading the pack. Sloan closed 997,800 square feet of work as compared to Rich's 595,000 square feet, A & M's 400,000 square feet and Jacobson 262,000 square feet. Sloan is proving to be a big addition to our New Jersey business.

Ed Sheridan - Rochester, Syracuse, Buffalo and Erie

Rochester & Syracuse - Apparently our customers own the Syracuse market because they are batting 100% for the second quarter and also 100% for the first half. I wish I could believe that we have closed all the work available in Syracuse but I cannot. In Rochester, Rochester Acoustical continues to close the Kodak work and also the available Luminaire work. Of the 273,000 square feet reported the second quarter, Rochester Acoustical got 208,000 square feet. Through the first half of 1974 our customers are at the 87% mark of reported work closed.

Buffalo & Erie - Reported closings in Buffalo second quarter were down considerably as compared to first quarter figures. Ed reported on 375,000 square feet this reporting period versus 1,165,000 square feet the first quarter. Arcon closed about 50% of the reported second half footage which allowed our customers to closed 54% of the footage reported on in the first half. Our new customer in Buffalo, Lerch-Hubbell, has not really taken off as we hoped they would. We are all interested to see what will happen with them in the last half of this year.

Bob Baram - Long Island

In my first quarter report, I made the statement that with Island Acoustics and Jacobson we appeared to have the horses on the Island. Unfortunately one of our horses passed away which causes me to somewhat retract that statement. Jacobson closed up shop and moved to New York and Elizabeth. Island closed 245,000 square feet this reporting period. The total work reported on the first half, our customers captured 78% of that volume. Island still gets the share of the cheap work like the Grant Store where we hope Jacobson will still be active on the big prestige jobs.

Bob Baram - New York City and Westchester
(The New York City report only includes Bob Baram customers. We will pick up the other New York customers in the third quarter and include in the second quarter figures for them.)

Bob reported on 950,000 square feet this reporting period, with our customers closing 420,000 square feet of that total. Jacobson and National closed the bulk of that figure. Closings appear to be way off in New York City. Some very pessimistic article are now appearing in the local papers forecasting gloom for the contracting business in the City. We still have a good backlog of schools to ship in the City once they are really for material. Our office building backlog could be good if tenants rent spaces. Westchester still appears weak with one closing of 24,000 square feet.

Werner Kiessling - Boston and Providence

Werner followed over 1,000,000 square feet of work during this reporting period. His three customers accounted for 600,000 square feet of that footage followed. Overall for the first half, we have closed 53% of the work good for 1,740,000 square feet. No real large jobs were closed in the second quarter but a lot of small ones were knock off. H. Carr and Sons continue to be tough in their while K & H Contractors do well in the Boston market. White does trend to get all of the Luminaire jobs in Boston.

Neg Norton - Vermont, Albany, Utica, Binghamton, Elmira, Hudson Vall and Northern New York State

Vermont - Nothing to really report other than there apparentl is not much going on in Vermont. This reporting period 52,000 square feet was reported on with Pitcher getting 8,000 square feet of that. Bader where are you?

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Albany - Albany picked up the second quarter from a first quarter footage reported of 191,500 square feet to 483,000 square feet this period. Our customers are at the 59% penetration mark for the year with honors going to Bud Brickman. Bud has closed over half of the footage reported on thus far this year. For the Albany area this is the first descent reporting period with some footage in it in over a year. Hopefully Albany is starting to get going.

Utica - Carmen Milograno was blanked this reporting period, but M & K came in from Binghamton and knocked off the one big job reported for 100,000 square feet. Even with the blank in the second quarter for Carmen, we got 49% of the first half business.

Binghamton - Elmira - Not enough footage reported to write a report on.

Hudson Valley - M & K is not closing work in Binghamton but they are definitely closing good jobs outside their immediate backyard. They closed a 215,000 square foot hospital in Harris. Neg reported on 473,000 square feet this reporting periodversus 36,000 square feet the first quarter. Hudson Valley A & P knocked off four jobs this time good for 173,000 square feet which will definitel help our cause. Our customers got 88% of the reported footage for the first half good for 450,000 square feet.

North New York State (new reporting area) - Since we know have a new viable customer in North New York State closing work, we have added that area to this report. Besides the new customer Theodore Stay and Sons, closing 87,000 square feet of work, M & K went wandering and closed 125,000 square foot library in Plattsburg. This is more activity in Northern New York in one quarter than we have ha in the last 10 years, I also might add that Theodore Stays' first order with us had Armashield in it. What a way to start with a new customer.

Through the first half of 1974 as a Regional Office, we have reported on 21,879,400 square feet, closed 13,421,970 square feet of that figure for a market penetration of 61%.

jb

Northeastern

ACSD - REGIONAL OFFICE QUARTERLY REPORT

370 a

YEAR TO DATE – 2d Qtr.

TRADING AREA/SALESMAN	ARMSTRONG CONTRACTOR(S)	S/F CLOSED	S/F FOLLOWED	% S/F CLOSED
Bob Hosier				
Connecticut	Thermal Acoustics	275,000 SF		
	Conn Acoustics	215,000 SF	1,505,000SF	34%
	H. Carey Sons	40,000 SF		
		530,000SF		
Springfield, Mass.	Johnson Acoustics	280,000SF		
	C.T. Blackman	5,000SF	691,000SF	43%
	H. Carey Sons	15,000 SF		
		300,000SF		
Worcester, Mass.	Fitcher Assoc.	60,000SF	570,000SF	11%
New Hampshire	John Pratt	105,000 SF		
	Fitcher Assoc	320,000SF	605,000SF	70%
		425,000SF		
Maine	Franck Acoustics	70,000 SF		
	Blanchard Products	100,000SF	405,000SF	42%
	Acoustical Products	25,000SF		
		195,000SF		
Bruce Kerbo				
New Jersey	Arthi Contracting Co	588,500 SF		
	Harry Rice Assoc Plaster	232,500SF		
	Sloan Acoustics	1,700,000SF	(See Next Page)	(See Next Page)
	Jacobson, N.J.	470,000 SF		
	Wm. J Scully	270,000 SF		

TOTAL R/O

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Northeastern

ACSD - REGIONAL OFFICE QUARTERLY REPORT

371 a

YEAR TO DATE – 2d Qtr.

TRADING AREA/SALESMAN	ARMSTRONG CONTRACTOR(S)	S/F CLOSED	S/F FOLLOWED	% S/F CLOSED
	Circle Acoustics	24,000 SF	5,623,450	70%
	Island Acoustics	160,000 SF		
Ed Sheridan				
Erie	Erie Acoustical	430,000 SF	480,000 SF	90%
Rochester	Carey Lathing & Acoust. Corp.	347,000 SF		
	Rochester Acoust. Corp.	398,000 SF	855,000 SF	87%
		745,000 SF		
Buffalo	Armon	785,000 SF		
	Lmk-Hubbell	40,000 SF	1,540,000 SF	54%
		825,000 SF		
Syracuse	Eastwood & Clgs. Co.	275,000 SF		
	Acme	240,000 SF	515,000 SF	100%
		515,000 SF		
Bob Baum				
Long Island	Island Acoustics	582,900 SF		
	Jacobus & Co., L.I.	177,000 SF	845,040	78%
		654,900 SF		

TOTAL R/O

Northeastern

ACSD - REGIONAL OFFICE QUARTERLY REPORT

372 a

YEAR TO DATE – 2.1 Qtr

TRADING AREA/SALESMAN	ARMSTRONG CONTRACTOR(S)	S/F CLOSED	S/F FOLLOWED	% S/F CLOSED
Bob Baram	Wm. J. Scully	954,200SF		
N.Y. City &	Circle Acoustics	180,000SF		
Westchester	Superior Acoustics	214,000SF		
	James A. Phillips	247,000SF		
	National Acoustics	242,450SF	2,950,010SF	73%
	Jacobson & Co., N.Y.	285,360SF		
	Bell Acoustics	30,000SF		
		2,150,010SF		
Werner Kiessling				
Boston - Providence	K & H Const.	942,000SF		
	H. Carr & Sons	481,000SF	3,303,000SF	53%
	White Clgs.	317,000SF		
		1,740,000SF		
Reg Norton				
Hudson Valley	Hudson Valley A & P	181,000SF		
	C.T. Beckman	24,000SF		
	Muncini - Klimchuck	215,000SF	509,000SF	88%
	Davis Acoustical	30,000SF		
		450,000SF		
Binghamton - Elmira	Elmira Acoustics	3,000SF		
	Muncini - Klimchuck	2,000SF	184,500SF	3%
		5,000SF		
TOTAL R/O				

Form 4204B R [illegible]

Armstrong CORK COMPANY

NO ENVELOPE REQUIRED

INTER / OFFICE COMMUNICATION

FORM 2961 8-61

TO N F. Underwood - ACSD - Lancaster

FROM B G. Koehn - " - Saddle Brook

SUBJECT Jacobson + defective materials

DATE 2/6/74

MESSAGE

As a concerned student of ceiling systems business, I thought you'd be interested to know how the ~~said~~ big J plans to handle material complaints with suppliers.

Rather thorough isn't it?

B G Koehn

SIGNED

REPLY

~~Thanks~~ - You'd better hold on to your packetbook when you deal with these people.

DHM

NFU Jr.

No, no professional !!

SIGNED DATE

Exhibit O Annexed to Affidavit of Phillip W. Unger

Memorandum from B. G. Koehn to N. F. Underwood, Dated February 6, 1974, Enclosing Memorandum by Jacobson & Company, Inc., Entitled "Defective Material, Reports and Letter", Dated February 4, 1974

SUBJECT: DEFECTIVE MATERIAL, REPORTS AND LETTER 374 a	DATE: 2/4/74	
	PAGE: 1 OF 5	SECTION: G. P.

The following is a policy which must be adhered to by all company personnel who are indicated below to have responsibility for action on defective materials. Defective material problems must be handled properly to assure the customer, architect and general contractor of a proper installation and to insure that Jacobson & Company is properly protected and compensated for replacement materials, culling, removal and other costs which are directly or indirectly resulting from the defective material problem.

DUTIES OF THE FIELD FOREMAN

He must immediately notify his construction supervisor upon discovery of the defective material. In the absence of the construction supervisor, he is to notify the salesman or project manager handling the job. Foremen must not install any defective material unless specifically authorized by the construction supervisor.

DUTIES OF THE CONSTRUCTION SUPERVISOR

A Defective Material Report (copy attached) is to be filled out by the construction supervisor and forwarded to the salesman or project manager with a copy to the Director of Construction.

DUTIES OF THE SALESMAN OR PROJECT MANAGER

The salesman or project manager must immediately notify the manufacturer by phone and shall accompany the manufacturer's representative on a visit to the job site to recommend action to be taken. He must also send a copy of the Defective Material Report along with a Defective Material Form Letter (copy attached) to the manufacturer to assure that there is a formal complaint lodged and on record. Copies of the letter and Defective Material Report shall now be sent to the following personnel:

New York Office, c/o Secretary Treasurer
Construction Supervisor
Director of Construction
Purchasing Manager

NEGOTIATING A SETTLEMENT

In view of our contractual requirements, it is essential that we promptly agree upon an acceptable course of action regarding remedial work necessary to correct the defective material situation. It is essential that the manufacturer shall acknowledge and agree to bear the costs of the required repairs (in writing) which shall include, but not be limited to, the following:

Material replacement.
Material handling of replacement material.
Cost of additional hoist time.
Removal of defective material in place or in cartons from premises and trucking involved for same.
Culling, sorting etc.

In the event that the manufacturer does not send a letter acknowledging the remuneration agreement (or if you feel he probably will not) you must send him a letter confirming the agreement. It is always preferable that you write a letter whether you think he will write or not. The letter should be structured in the following way and sent "Certified" or "Registered Mail" with a return receipt requested:

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SAMPLE AGREEMENT LETTER

Dear Supplier:

Subject: Defective Material on XYZ Project

Paragraph 1 - (Description of problem(s) and confirmation of his visit to project with names of all persons attending meeting.)

Paragraph 2 - (Describe in detail the resolution and remuneration agreement reached with the supplier representative and how costs will be determined.)

Paragraph 3 - We believe that the agreement represents the arrangements arrived at during our meeting to resolve the defective material problem outlined above. If this does not agree with your recollection of the agreement, please notify us immediately by return mail. If we do not hear from you by mail by _____(usually seven days after date of letter), we shall assume that this agreement is acceptable in all respects.

Copies of the agreement letter shall be sent to:

Other members of the manufacturing company involved as deemed desirable.
The New York Office, c/o Secretary/Treasurer
Purchasing Manager.

In those instances where the material defects appear to involve substantial costs or liabilities, an officer of the company (president, director of construction or sales manager) shall be notified and shall assist in negotiations.

In certain cases a lump sum agreement is arrived at and in those instances it is not necessary to open up a T & M job number.

PROCEDURE FOR WRITING UP A T & M ORDER FOR DEFECTIVE MATERIAL PROBLEM

When a salesman comes to an agreement with a supplier for whom we are to do corrective work, the salesman must write up a regular T & M job number in order that a cost record can be kept in Accounting of all of the labor and material involved in doing this corrective work. The cost sheet should be sent to the Secretary/Treasurer so that she can follow-through and make certain that the T & M is issued properly.

When the job is finished, the Construction Department as usual should send the blue copy to Accounting. Accounting will then compile the data and send the salesman a copy, so he can determine exactly what to charge against the supplier.

376 a

The salesman will then advise Accounting by written memorandum as to the amount to be charged and a bill will go out to the supplier on this basis. This bill will then be deducted from any monies due the supplier.

When the salesman writes up this T & M, he should be certain to state:

Back charge for _____(job name), in connection

with job number _____(state original job number), as per

Defective Material Report dated _____.

In this way, the corrective work and the original job can be tied together.

Back charges for defective material problems shall be marked up for overhead 20% only. Profit shall not be applied.

If for any reason the supplier does not allow the amount involved, any balance remaining will be transferred against the cost of the original job. Furthermore, if for any reason this work is not to go ahead, Accounting should be notified.

THE FOLLOWING POINTS ARE RESTATED BECAUSE OF THEIR IMPORTANCE:

1. Manufacturer's verbal okay to proceed with work:
   Must be in writing by an authorized, responsible person and on their letterhead. Personnel shifts can be costly if we have nothing in writing to substantiate agreements to pay for repairs.

2. Responsibility for material:
   If a manufacturer wants to leave defective material on job site until final resolution of problem, he must take full responsibility. In addition to our not taking responsibility, manufacturer must pay us each time we have to move the material. Do not settle for a lump sum. This can be costly as we do not know how many times we may have to move this material. Manufacturer shall also direct us in writing as to final disposition of defective material. UNDER NO CIRCUMSTANCES SHALL MATERIAL BE REMOVED FROM THE JOB (OR WAREHOUSE IF IT HAS BEEN MOVED THERE) UNTIL THE MANUFACTURER'S REPRESENTATIVE HAS SEEN IT AND DIRECTED YOU TO DISPOSE OF IT AND HAS AGREED TO ALL COSTS OF DOING SAME.

3. Return of material:
   Cost of all trucking and handling is to be borne by manufacturer.

4. Repacking of material:
   All cost to cull, sort and repack for disposal is to be borne by the manufacturer.

DATE: _____

OUR JOB # 377 a

DEFECTIVE MATERIAL REPORT

1. PROJECT NAME: _____

   PROJECT LOCATION: _____

2. GENERAL CONTRACTOR OR OWNER: _____

3. ARCHITECT: _____

4. MANUFACTURER OF DEFECTIVE MATERIAL: _____

5. PRODUCT: _____

6. WHAT IS THE SPECIFIC NATURE OF THE DEFECT? _____

   _____

   _____

7. HOW MANY FEET ARE INVOLVED? _____

8. DATE ON WHICH PRODUCT FAILURE WAS FIRST NOTED: _____

9. JOB SITE AREA IN WHICH DEFECT WAS NOTED: _____

   _____

10. HAVE COMPLAINTS BEEN REGISTERED AT THE JOB? _____

11. WHO FILED COMPLAINTS? _____

    _____

REMARKS:

_____

_____

_____

_____

_____

SAMPLE DEFECTIVE MATERIAL TRANSMITTAL LETTER

Date

Subject: Defective Material
Project: _____
Location: _____

Gentlemen:

Confirming our telephone conversation, please find attached our Defective Material Report on your product on the project referenced above.

Please confirm in writing what remedial action you recommend to correct this deficiency.

A mutually acceptable course of action between your Company and Jacobson & Company, Inc. must be agreed upon and confirmed before Jacobson & Company, Inc. will begin corrective work.

All corrective costs to repair this defective material, as per our agreement, will be borne by your Company. Upon completion of this extra work, we will invoice you for costs incurred.

Thank you for your cooperation.

Yours very truly,

Salesman/SEC Manager

cc: Secretary/Treasurer
Construction Supervisor
Director of Construction
Purchasing Manager
Job File

Exhibit P Annexed to Affidavit of Phillip W. Unger

Memorandum from Richard C. Wiley to R. J. Butler, Dated September 5, 1975

R. J. Butler, Arch Clg Sys Div, Lancaster September 5, 1975

R. C. Wiley, Arch Clg Sys Div, New York

Jacobson and Company, Inc.
New York, New York
Newark State College Science Building

Thanks for your note on the above subject. I wish I had the information you furnished.

I fought this claim for two years and we carried the deduction on our ledgers for that length of time. As a matter of principle, I finally succumbed to Gottfried's plea to clean up the ledger. I was going to carry it forever. As far as I was concerned, it was the same old Jacobson baloney. Make a mistake and then find an excuse to pin it on a supplier.

John will just find us tougher and tougher to deal with if he insists on this time honored Jacobson approach to "working" with suppliers.

BEST COPY AVAILABLE

Exhibit Q Annexed to Affidavit of Phillip W. Unger

Letter to John D. Jacobson from Robert A. Baram, Dated February 10, 1975

February 10, 1975

Mr. John D. Jacobson
President
Jacobson & Company, Inc.
104 East 25th Street
New York, New York 10010

Re: Hendrick Hudson Job
Your P. O. #5476
Job #19499
Armstrong Requisition #20766
Invoice date 10/24/74

Dear John:

John, it has come to my attention that ~~another~~ Jacobson and Company order has run amiss.

I am enclosing a copy of my November 11, 1974 letter where I request payment of this invoice at its' proper due date.

Lets' get this matter off the books as soon as possible. There is absolutely no justification for a credit here -- - - - our prices are time of shipment unless otherwise noted. We shipped well within our shipping promise when this order went out - - - Therefore the prices billed are correct.

If I can provide further information I am at your service.

Very truly yours,

Robert A. Baram
Architectural Representative
Architectural Ceiling System Division

LCL

P. Gottfried, Customer Finance Service

Exhibit R Annexed to Affidavit of Phillip W. Unger

Memorandum from R. W. Hadfield to D. G. Smith, Dated May 21, 1975

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May 21, 1975

D. G. Smith, Adv & Mkt Serv

R. W. Hadfield, Arch Clg Sys Div

Jacobson & Company, Inc.
Armstrong Acoustical Products
Direct Mail Campaign

Don, recently the attached information to this memorandum was sent to Fred Schweizer and Phil Unger from John D. Jacobson, President of the subject firm. Please review his proposal and advise me of the cost to Armstrong for preparation of the art work, mechanicals, and printing for approximately 2,000 pieces.

Take a few days to evaluate this proposal and then we can discuss the entire matter on Tuesday, May 27. I'll look forward to hearing from you with your thoughts and ideas on this proposition.

SJD

Enclosures

P. W. Unger
D. H. McNaughton

BF
I'd like to bid on it but back on a cost + pending claims I have little interest in doing any more for Armstrong
That's putting it mildly
Don

Exhibit S Annexed to Affidavit of Phillip W. Unger

Memorandum from Richard C. Wiley to Phillip W. Unger, Dated July 16, 1974

382a

P. W. Unger, Arch Clg Sys Div, Lancaster July 16,1974

R. C. Wiley, Arch Clg Sys Div, NY

Jacobson & Company
U. S. Court House
Philadelphia, PA

Attached is all our correspondence, our order form and Jacobson's purchase order on the subject job. More importantly is a copy of my note as I took down the requested information from Jack Binder and then quoted him. The prices were confirmed by my letter of November 28, 1972.

Nowhere will you find reference to an NRC. To the best of my memory no information was requested on our ability to meet a specified NRC. The question of STC very definitely came up and you will note in my letter of 11/28 that I told Binder what to do to meet an STC of 45-49. I remember very vividly calling NED for that information. Very simply put, Jacobson never asked or questioned our ability to produce a piece of material that could meet the required NRC of .65 to .75. Knowing this was a Federal project and that ultimately we would have to certify the performance of our material we would have checked specifically to insure that we would be able to meet the spec, just as we did on the STC. You will also note that our original quotation was based on Minaboard. Jacobson were the ones that made up their minds that they could meet the specification with our product without any encouragement from us.

This is the third time in seven months that Jacobson & Co. has tried to hold us responsible for interpretation of specifications, hanging their hat on the basis of our quotation and/or what our literature says or doesn't say.

To this day we haven't seen a copy of this specification. We have relied strictly on the information supplied to us by Jacobson. This is so often the case with many quotations made to many contractors.

cm

W. W. Locke, Lancaster
D. G. Koehn, Arch Clg Sys, NY
W. Koenig, Arch Clg Sys, Philadelphia

Exhibit T Annexed to Affidavit of Phillip W. Unger

Memorandum from Robert A. Baram to R. J. Butler, Dated May 2, 1975

INTER/OFFICE COMMUNICATION

OK / write / Baram

Armstrong

383 a

To R. J. Butler; Arch Clg Sys Div, Lancaster May 2, 1975

From R. A. Baram, Arch Clg Sys Div, New York

Subject CCNY - Northern Academic Center
New York City

Bob, this order for 350,00 sq. ft. of #527 Colomar Travertone was in fact placed on November 6, 1974 with a price of $.305 per sq. ft. for shipment through June 30, 1975. After that date, of course, we would get escalation based on six month periods.

The Armstrong Requisition Number is 21181.

We also added, via a price form, two cents per sq. ft. if AGT Back Coating is required.

John Higgins, the Jacobson salesman, will accept, he now indicates, an STC of 35-39. But, as usual with this customer, there is a kicker!

Higgins maintains that since our old 1974 sheets indicates an STC of 35-39 as a standard and an STC of 40-44 with AGT Backing his price was based on standard material of 1974 which would be a 35-39 STC. So, they are now trying to, unfairly, squeeze us for an STC of 35-39 at the $.305 price.

Bob, it is my feeling that they may have a leg here but this is just a ploy to "sweeten the job" to the tune of $7000+ for Jacobson.

That is where the situation stands.

I look forward to your comments on this matter.

One more thing, Higgins main "job" right now is to "better the contract" on Jacobson jobs.

Kindest personal regards.

Very truly yours,

Bob

lcl

D. F. Lopez, Arch Clg Sys Div, NY

John - your file

Exhibit U Annexed to Affidavit of Phillip W. Unger
Memorandum from P. Peter Gottfried to Richard C. Wiley, Dated March 21, 1975

INTER/OFFICE COMMUNICATION — Armstrong

To R. C. Wiley, Arch Clg Sys Div, Saddle Brook — March 21, 1975

From P. Peter Gottfried, Cust Fin Serv, Lancaster

384 a

Subject Jacobson & Company, New York, New York
Newark State College Academic Building
Union, New Jersey

Dick, any progress in getting Jacobson to settle the outstanding balance due on this project. We see from Bob Butler's memo of February 26 that you were going to write Jacobson and tell them to pay up.

As you recognize, this thing is now more than a year old; and it would seem in that length of time some agreement could have been reached which would settle this bill. From our point of view, it seems totally unfair that we should be carrying this outstanding balance. If a credit is due from our end, let's get the thing cleared. Then let's get Jacobson to send us a check now. Every month we wait costs us more money.

NLH

Arch Clg Sys Div, Saddle Brook
D. F. Lopez
P. R. Langan
R. J. Butler, Arch Clg Sys Div

RECEIVED
MAR 24 1975
ARMSTRONG CORK CO.
ARCHITECTURAL SALES
NEW YORK DISTRICT OFFICE

Exhibit V Annexed to Affidavit of Phillip W. Unger

Memorandum from Richard C. Wiley to D. H. McNauhton, Dated May 9, 1975

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INTER/OFFICE COMMUNICATION

Armstrong

To D.H. McNauhton, Arch Clg SYS Div, Lancaster May 9,1975

From R.C. Wiley, Arch Clg Sys Div, New York

Subject Jacobson & Company
Elizabeth, N.J.
Academic Building
Newark State College
Union, N.J.
Claim For Credit

John Jacobson was nice enough to pull together the whole ream of correspondence we have had on the subject claim into one nice tidy package. This was with his letter of rebuff addressed to yours truly.

All of this can be summarized down very quickly to a few key points.

1. John is still claiming that because we quoted on a special fixture that it covered all the requirements of the specifications.

2. That because of Peter Koch's involvement with the project that he knew all about the fixtures requirements and it was his fault that the junction box was missed at the time of bidding.

3. That our involement in trying to work this out with the Architect and later on by making a short term offer is an admission of culpability.

4. He views the short term agreement of 1/3--2/3 sharing of the costs as a firm final offer which he accepted. He now wants his money and wants us to swollow the big bite.

All of this is patently redicilious. Would you please call me on Monday morning, May 12 to discuss this further. I am going to try and see John on Monday afternoon and take one final stab at settleting it peacefully.

RCW

Exhibit W Annexed to Affidavit of Phillip W. Unger

Letter to Richard C. Wiley from John D. Jacobson

Dated December 11, 1973

(3)

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

ABOVE ALL Quality OVER 80 YEARS

386 a

December 11, 1973

Mr. Richard G. Wiley
Armstrong Cork Company
Park 80 Plaza West - One
Garden State Parkway at Interstate 80
Saddle Brook, New Jersey 07662

Re: Academic Building
Newark State College
Union, New Jersey - JA793

Dear Dick:

At our meeting today in my office we reviewed the difficulties in connection with the above project. Let me set forth the record as substantiated by our files and my personal discussions today with you and our personnel.

1. It is understood that Bruce Koehn of your organization was instrumental in writing the specification, was thoroughly familiar with the project and had been involved with the engineer, Louis Goldberg, in the design of the Luminaire System for this project. Pat O'Malley advised me that Mr. Koehn had reviewed the specification and drawings prior to submitting prices on the Luminaire components.

2. On February 6, 1973 we received a price confirmation for the Armstrong materials specified by the architect - see attached. In this price confirmation no exceptions to the specification were made.

3. As you now know, it is apparent that Armstrong's price confirmation did not include the cost of the junction box which was a requirement of the specification. The price for this special fixture could not have been obtained from the standard price list as it was "special". This price confirmation from Mr. Koehn was used in the preparation of our bid and was the basis on which we secured a contract. In view of Mr. Koehn's involvement with the engineer during the design stage and in view of our discussions with him prior to the bid we relied on this price confirmation as being relative to the specification. (You will note that the price [illegible] March 5, 1973 as per the attached.)

BEST COPY AVAILABLE

387 a

4. We have a contractual liability to provide your product as specified and we ultimately secured a contract agreement based on your price confirmation. It is my understanding, Dick, that you had researched this problem and had determined that the junction boxes could have been placed on the fixture at the factory for approximately an additional $3.60 per fixture. The electrical contractor on the job had given us a price to conform these fixtures to the specification on the job of approximately $6.70 per fixture. Subsequently, we received a price of $4.85 from a local electrician to conform these fixtures to the specification. At your request we appealed to the contractor and to the State in writing, but to no avail. Accordingly, I have directed Al Sweetwood to enter into an agreement with Schwarz Electrical to do the work at the price not to exceed $4.85 per fixture. Any further delay will increase your liability for this error. Could have this.

Mr. Koehn stated that it would be impractical to return these fixtures to the factory to have them conformed to the specification because of the tight construction schedule and possible liquidated damages. It is for this reason that we secured competitive prices to overcome this deficiency and advised you today of the action that we would take to remedy this serious problem.

5. Pat O'Malley has stated that Mr. Koehn was thoroughly familiar with the specification and that jointly they prepared a list of the components for our purchase order.

6. I was also advised, Dick, that you called Rick Connole, our controller, and advised him not to pay the bill as there were problems involved that had not been resolved as of this date and that we would not lose our discount as a result of the direction that you gave to Mr. Connole.

Jacobson and Company will not be financially liable for this price conformation error as it was this price which induced us to enter into a subcontract. At our meeting today in my office I advised you of our position and I am awaiting your reply which should be full responsibility for this situation.

This position of a contractor can never be allowed to stand. Has a cause

Sincerely,

John D. Jacobson
President

JDJ:mc
Enclosures
CC: William Locke
A. M. Sweetwood, Rickart A. Connole, Beatrice Stanley, Patrick J. O'Malley,

Exhibit X Annexed to Affidavit of Phillip W. Unger

Letter to John D. Jacobson from P. Peter Gottfried,
Dated May 28, 1975

yes file

388 a

May 28, 1975

Mr. John D. Jacobson, President
Jacobson & Company, Inc.
104 East 25th Street
New York, NY 10010

Dear Mr. Jacobson:

As you are aware, we have several large outstanding deductions on your account which date back many months and, in fact, one goes back as far as February, 1974. We have been advised by our marketing people that these deductions are not in order and that payment should be forthcoming from your company.

We are listing below the dates, the amounts, and the projects involved with each deduction.

February 20, 1974	Newark College of Engineering	$ 9,480.16
March 21, 1974	Newark College of Science	395.25
December 18, 1974	New York Stock Exchange	1,019.19
December 18, 1974	New York Stock Exchange	956.13
	Total -	$11,850.73

In view of the length of time these deductions have been outstanding, we feel it is only reasonable that we now ask you to pay the total amount by June 13. In the event payment does not reach us by that date, we will seek alternative measures to collect this outstanding balance.

Thank you for your cooperation.

Very truly yours,

P. Peter Gottfried
Manager
Customer Financial Services
Architectural and Residential
Ceiling Systems Divisions

NLH

Arch Clg Sys Div, Saddle Brook
R. C. Wiley
D. F. Lopez
P. R. Langan
R. A. Baran, Jamaica Estates, New York
Arch Clg Sys Div
P. W. Unger
D. H. McNaughton
J. J. Burke, Legal
NOTE TO COPIES:

This will confirm Phil Unger's request that we write to Jacobson and tell him the claims are due and give him a couple of weeks to pay. If they do not pay by that time, our plan of action will be to call John Jacobson and tell him we are going to hold orders until they do pay. We would appreciate the New York District Office personnel maintaining a low profile with Jacobson until after June 13—let's give Jacobson an opportunity to perform.

ARMSTRONG CORK CO.
ARCHITECTURAL SALES
NEW YORK

Exhibit Y Annexed to Affidavit of Phillip W. Unger

Memorandum from Robert A. Baram to Richard C. Wiley, Dated July 22, 1975

Don Note file

INTER/OFFICE COMMUNICATION

390 a Armstrong

To R. C. Wiley, Arch Clg Sys Div, New York July 22, 1975

From R. A. Baram, Arch Clg Sys Div, New York

Subject Nassau County Community College Job
Phase II

Dick, this memo will contain the story of this job as best as I can explain it.

The "job" designed by Eggers Partnership, New York City, Joe Capano, Partner-In-Charge was originally set up for Gil Phillips using U.S.G. Glacier Panels and Delta Grid.

In fact, as hearsay, Jack Dunigan, way back at the spec stage was told to "forget it" when he approached Capano about an alternate system.

In about January of 1974, the job bid. The reason I do not have the exact date on hand is that I sent, recently, the original of the first price exception form to Bob Butler and it has not been returned to me. It was, I believe, for Scully as well as Jacobson. The form had been filled out by Dave Dombar originally. In fact, we were told we could provide sizes in Sanserra originally but after some reluctance we were told Colomar. Dave had told me for sizes less than 12" x 12" I should figure $.65 per square foot. For sizes greater than 12" x 12" $.95 per square foot.

With this information, in January of 1974 (again Butler has my copy of the form) I sat down with John Jacobson and Sam Schanzer and was asked about prices on NCCC. I gave them the information and they were fairly agreeable. At a subsequent meeting soon after, we agreed on $.95 per square foot for greater than 12" x 12" items and $.65 per square foot for less than as a fair price. I made it very plain to John and Sam, knowing quite well there would be more than one size that:

a) there would be a set-up charge for each and every size made.

b) each six month period there would be a 10% escalation of price

They informed me that we would have a deal and asked me to sign their standard form of price quote. At the time I signed I believed I acted in good faith and that the form had no more value or legality than the standard form letter I was sending as a price letter to them which was standard Armstrong-Jacobson policy at that point in time. Anytime I gave Jacobson people an price quote, I would follow-up with a letter to the quoted party as well as Bea Stanley (Van Park at that time?) and their Purchasing Department.

Form 1502 1-71 NO ENVELOPE REQUIRED

In signing Jacobson's form hear in mind, I again repeat that I expected this to be a deal and to receive a purchase order as was promised by Mr. Sam Schanzer. I signed as consideration for his promise to send a purchase order based on my signed firm quote. None was received until quite recently, however.

In the interim, I asked for a purchase order from time-to-time until about April of 1974 when John Higgins and John and Sam came back to me with requests for new pricing on 7 items. I got these from Bill Locke in a memo dated 4/30/74 with a request I not put this in writing until we had a firm idea. I did not panic at the time because Bill's prices based on Sanserra at Jacobson's request, were in line or <u>better</u> than what had been given earlier--and, of course, for 7 sizes which, although not fantastic, at least workable, and apparently, quotable.

Just about the time I gave them this verbal quote, they told me they did not want to go with Sanserra. It is interesting to note, however, that the Locke quote was based on drawings provided by Jacobson which showed 7 sizes -- no 28 or 29 or 30.

In November of 1974? (again Butler has correspondence), Bob Butler quoted on about 8 different sizes of [illegible] fairly high prices. They were given to Sam Schanzer or John Higgins in memo form and Sam was upset over the price increases. The prices were then given to Warren Watts who maintained that although some items were higher than the original $.95 per square foot, others were less and he could balance it out. At that time I again said to Sam Schanzer that all of this is ridiculous because we did not have a purchase order.

Along the way, two other phases of NOCC bid and Island has one with Minatone and no real problems and Donaldson will be coming to us with their job for firm quotes on more than one size--but not 28 or 29.

It is my true statement that for the last 6 - 8 months, since Warren Watts has been on this job, I have continually asked him at least once a week for the final amount of sizes on this job as I knew it was a special and lead time would be needed. The same as with the deal on New York Stock which you know about. Each time I asked for a final purchase order and a breakdown Warren was always a week away from it. I once mentioned this to Sam and took the liberty of telling him that Hank Eckstein was not having all this difficulty with his job at Island. He replied that one of the reasons Hank is no longer with us is because he could not handle the job. May I also add, that this job was handled by Vito DeLuna originally, then Hank Eckstein, the Sam and John Higgins and, finally, Warren Watts. Enough people handled the job before Warren that it was almost as if it were a new job when Warren took it over.

Again, I reiterate, I did not just "leave my prices" and wait for something to happen. I was after Warren and at times Sam almost constantly for some movement towards finalizing what they needed. I was not too concerned with the form I signed because even with Butler's quote of several months ago Jacobson thought and told me it would work out.

Finally, about 2 weeks before I received the Jacobson purchase order, I mentioned to you what was about to happen. That is because at that time I was told the final number of sizes and added up the arithmatic and knew this was not good for 140,000 square feet Warren and Sam's reaction was "we've got your name on the form". When Warren gave me the final form, I took it back to the office and saw it was still screwed up. Two or three sizes were listed wrong. I called him and he corrected it. My contention is that he still did not know what the hell he was doing.

The order was then sent to R. J. Butler and subsequent events are quite familiar to you.

My mistake, here, was signing the form. However, is it any worse than a letter which states "there are three prices, life-of-job, etc" Yes, it is. However, the Jacobson organization would like a simple price letter from us and hold that over our head as well as anything else.

I followed up with the customer, continuously, for nearly 18 months. The real serious situation occurred near the end when the amount of sizes was finalized. Until then, we did not have a real big problem.

But, Dick, you are right! I'm sure they were shopping that job all along. The same way they do on every job.

Perhaps we should ask whether we are doing business with honorable people as apposed to how did or could this happen. Are our people that bad? How come every time "we" screw up it's with Jacobson? Our other contractors bid and take difficult work. Why is it only there people have problems with us?

Every problem, fault and difficulty has two sides. It seems whenever our people provide service to Jacobson, there is something going wrong. I know when I provide it, it is to be helpful. Not to hurt them or Armstrong.

Again, I feel I should not have signed their form, other than that, I acted judiciously all the way. As soon as I knew the size situation it was mentioned--although at a late date. But I believe that is the way Jacobson planned it so that we'd have little time to come up with an alternative and yet we'd be pushed by the threat of a law suit.

jb

Exhibit Z Annexed to Affidavit of Phillip W. Unger

Memorandum from R. J. Butler to Richard C. Wiley, Dated August 28, 1975

394 a

INTER/OFFICE COMMUNICATION

Armstrong

To R. C. Wiley, Arch Clg Sys Div, Saddle ook August 28, 1975

From R. J. Butler, Arch Clg Sys Div, Lancaster

Subject: Jacobson & Company
New York City, New York
Newark College of Science

Enclosed please find some correspondence from our mutual friend in New York City.

While in John's office last week, he brought up this complaint and could not find the file, so we never got into the details. As I pointed out to John, I really can't believe that their firm didn't know that T&G material cannot be installed on an H&T system. In fact, the reference in our literature does state that our fire rated material can be [illegible] or H&T suspension system. As you know, [illegible] is for our [illegible] and H&T would probably be used with K4C4 material, since it [illegible] much lower installation with that type of edge detail.

I realize that the above is probably just a bunch of wasted words, particularly since a policy adjustment has been entered and I signed it. But I thought I should point out something to you that happened five or six years ago. Jacobson installed approximately 200,000 SF of Item 512 at the Hunterton State Correctional Institute in Clinton, New Jersey. I remember the job well, because I worked on it for over two years. To make a long story short, the same type of problem came up -- Jacobson attempted to install the 512 on an H&T system. As you can well imagine, they called me to the job and expected me to bail them out of the situation. I wouldn't have any part of it and said that it's an industry known fact that T&G does not go on H&T -- it only can be installed on a Z-Bar. John Jacobson got into the act and refused to back down. I can remember we were talking about a $20,000 or $30,000 labor complaint. John, at that point, made a mistake (at least from his standpoint) and called in his construction superintendent. Charlie Ambros (the construction superintendent) agreed with me that Jacobson had made a mistake and it was a known fact that T&G should only be installed on a Z-Bar.

While I realize it's "water over the dam", I thought you might want to point this out to John if you deem necessary. As John says, "It's a matter of principal."

SJD

Enclosures

R. A. Baram, Jamaica Estates, New York

RECEIVED

ARMSTRONG CORK CO.
ARCHITECTURAL SALES
NEW YORK DISTRICT OFFICE

Exhibit AA Annexed to Affidavit of Phillip W. Unger
Letter to Armstrong Cork Company from Phillip A. Miller,
Dated July 11, 1975

395 a

Jacobson Supply Division
1079 East Grand St.
Elizabeth, N.J. 07201
(201) 355-5200

A SUBSIDIARY OF JACOBSON & CO. INC.

July 11, 1975

Armstrong Cork Company
Box 17585
Philadelphia, Penna.,

RE: Inv. 5-12-75
#158

Your invoice for $8.24 to cover costs of additional freight is hereby returned. Whatever deal the driver of the common carrier and the customer made in regards to deliver material to a special location was between the driver and the customer. It is our understanding that the customer paid the driver $10.00 to deliver this material to her basement since the general contractor was absent.

Regardless, all deliveries are tailgate and we understand this as do all our customers. This is an apparent cover for the additional time the carrier driver made for "coffee money".

Sincerely,

PHILLIP A. MILLER

PAM:bc

Exhibit BB Annexed to Affidavit of Phillip W. Unger

Jacobson Supply Center Advertisement, Dated October 10, 1975

Jacobson Supply Center
1079 East Grand St.
Elizabeth, N.J. 07201
(201) 355-5200
(212) 285-9840
A SUBSIDIARY OF JACOBSON & CO. INC.

396 a

October 10, 1975

TO: ACOUSTICAL CONTRACTORS

RE: 33⅓ OFF SALE

SUBJECT: ARMSTRONG LUMINAIRE/VGM PARTS

SAVE ONE THIRD ON TODAYS LIST PRICES, FOR THE BELOW LISTED ARMSTRONG LUMINAIRE AND VGM PARTS.

NO RESERVATIONS - FIRST PICK-UP - CLEANS-UP.

CODE NO.	ITEM	OUR STOCK	PCS/CTN	PRICE LIST	SPECIAL PRIC
611	Notch Cover-Plastic	400	100	.07	.04
616	Grid Clip	2000	500	.035	.02
621	Corner Clip Inside	125	25	.27	.18
622	Outside Corner Cap	175	25	.27	.18
623	Notch Cover-Metal	350	25	.10	.06
627U	60" Main Runners	30	30	1.75	1.20
628U	60" Cross Tees	630	30	1.64	1.10
629U	60" Cross Tees	50	30	1.75	1.20
630U	60" Cross Tees	780	30	1.78	1.20
632	Cross Tee Clips	100	100	.045	.03
633	Cover Plate-Black	225	100	.05	.03
635	60" Wall Mldg.	90	30	.215	.14
636	60" Wall Mldg.	450	30	.215	.14
649A	Main Runner Splice	1300	100	.135	.08

Jacobson Supply Center
1079 East Grand St.
Elizabeth, N.J. 07201
(201) 355-5200
(212) 285-9840
A SUBSIDIARY OF JACOBSON & CO. INC.

CODE NO.	ITEM	OUR STOCK	PCS/CTN	PRICE LIST	SPECIAL PRI
650	Standard Truss	160	20	.57	.38
651	Snap-in Truss	80	20	.57	.38
697A	Georgian Triangular Panels	64	16	1.15	.75
698A	Panels	72	8	3.36	2.25
699	Panels 29"X59"X1"	100	1	5.99	4.00
6012	Support Bar	7	10	1.32	.90
6020	Hanger Clips	900	100	.045	-.03
6027S	Georgian Panels	230	26	3.30	2.20
6105	Frames 2X2	30	10	5.45	3.50
6106A	Support Frames 2X4	84	10	6.00	4.00
6111	Georgian End Panels	22	22	2.65	1.80
6115	Supply Air Linear	60	4		5.00
6120	Cross Tee	100	50	.76	.50
6143	Supply Air Diffuser	12	6	13.35	9.00
6534	5' Air Bar	24	12	9.95	6.50
6538	60" Air Deflector Two Way	300	30	1.95	1.30
6547	V.G.M. Mounting Brackets	1200	20	2.40	1.60
6548	V.G.M. Panel Support	1120	20	3.95	2.60

Exhibit CC Annexed to Affidavit of Phillip W. Unger

Memorandum from W. Koenig to Phillip W. Unger,
Dated October 22, 1975

TO WRITE MESSAGE
TE MESSA[illegible] IN UP[illegible]ER HALF. REMOVE CANARY COPY (PART 2) [illegible] YOUR FILE. PLACE REST OF SET IN OUTGOING MAIL. PART 3 [illegible] RETURNED WITH REPLY.

REPLY LETTER

TO SEND REPLY
WRITE REPLY IN BOTTOM HALF. DESTROY CARBON. RETAIN WHITE COPY FOR YOUR FILE. PLACE PINK COPY (PART 3) IN OUTGOING MAIL.

85202

Armstrong CORK COMPANY

NO ENVELOPE REQUIRED

INTER / OFFICE COMMUNICATION

398 a

M 2961 8-61

P.W. Unger Inc

OM W Koenig - Phila

JECT Jacobson Supply Center | DATE 10/22/75

SAGE The enclosed article should be of interest. Thought you would like to know what some of our Ohio Customers & Co. [illegible] about. Getting rid of equipment the state is in these days but why Investment in current prices to the trade?

Regards SIGNED Walt

PERSONAL

R.C. MILEY

HERE IS AN EXAMPLE OF WHAT I MEAN — WE'LL HEAR BOUT THIS FROM MANY OF OUR PHILA CUSTOMERS. THESE EOPLE DON'T GIVE A DAMN ABOUT (A) — THEY NEVER AVE, AND NEVER WILL. I DOUBT VERY SERIOUSLY IF E WOULD GET IN 10 G. REALLY WORTH THE GRIEF! Phil

SIGNED DATE

BEST COPY AVAILABLE

Exhibit DD Annexed to Affidavit of Phillip W. Unger

Undated Memorandum from D. F. Lopez to Richard C. Wiley

INTER/OFFICE COMMUNICATION — Armstrong

399 a

To R. C. Wiley, Arch Clg Sys Div, Saddle Brook

From D. F. Lopez, Arch Clg Sys Div, Saddle Brook

Subject Jacobson & Company

On Tuesday 2-17-76 Sam Schanzer and John Higgins from Jacobson took me to lunch to discuss GSA Projects. They indicated they were interested in a couple of Projects in Southern New Jersey. After our luncheon meeting, they told me that they weren't very interested in Projects in Southern New Jersey but they wanted to bid the F.O.B. if in Atlanta.

They asked me if we would like to quote them on this Project and others like it across the country. They stated that they knew we could not legally refuse to quote them. However, they said if we didn't want to quote them we didn't have to and that they would bid other manufacturers material.

I contacted Dav Mc Naughton and he said he didn't want to quote them if he didn't have to.

I contacted Jacobson a couple of days later either Thursday or Friday 2/19 or 2/20. I told John Jacobson that as long as he had asked us if we want to quote or not that we would rather not quote him. We have several local contractors in Atlanta bidding on the Project and we feel we have adequate coverage.

John then changed his request and said he demanded that we quote him. I then told him that if we did quote him I wanted a commitment that he would give us the order if he got the job. John said he would not make that commitment because he wanted to compare our prices with other systems. He wanted to determine if he should use any particular manufacturers system or if he should assemble his own package of several manufacturers.

I then contacted Lancaster again and obtained the reflected ceiling plan on which our quotation was based and the quotation. On Friday 2-20 I gave John Jacobson, Sam Schanzer, and John Higgins the lay-out and the quotation.

The next week, week of 2-23, I asked Sam Schanzer if they also wanted pricing for the Standard tile portion of the job. He said that they were only bidding the integrated ceiling portion of the job.

The next time we discussed the job was at our convention March 10-12 at which time John Jacobson told me he was the low bidder. John also stated that he did not use our prices in his bid. He said that he assembled his our integrated packa from several manufacturers.

I had not discussed the job with anyone from Jacobson since the convention.

This note should provide you with the background information on this job.

Dan

Exhibit EE Annexed to Affidavit of Phillip W Unger

List—"Competitive Distributors of Mineral Ceilings"

4003a

COMPETITIVE DISTRIBUTORS OF MINERAL CEILINGS

Atlanta Office

FIRM	CITY	LINES HANDLED
Owens-Corning Fiberglas	Atlanta-Charlotte	Owens-Corning Fiberglas
"	Miami-Birmingham	Owens-Corning Fiberglas
"	Jacksonville-Nashville	Owens-Corning Fiberglas
"	Tampa	Owens-Corning Fiberglas
Dixie	Birmingham	United States Gypsum
Gladwyn Plastics	Atlanta	Johns-Manville
"	Tampa	Johns-Manville
Conwed	Atlanta	Conwed
Conwed	Charlotte	Conwed
National Gypsum	Atlanta	National Gypsum
S & C	Miami	United States Gypsum - Conwed

Cincinnati Office

Owens-Corning Plant	Newark, Ohio	Owens-Corning Fiberglas
Suburban Ceiling Supply	Cincinnati	Owens-Corning Fiberglas
Owens-Corning Supply	Louisville	Owens-Corning Fiberglas
Conwed Warehouse	Indianapolis	Conwed
SEE ATTACHED LIST FOR CONWED DISTRIBUTION CENTERS		
Owens-Corning Fiberglas	Oak Park, Mich.	OCF, Conwed, Celotex
Owens-Corning Contracting	Flint, Mich.	OCF, Conwed, Celotex (anything else they can buy)
Owens-Corning Dist. Center	Cleveland	OCF, Johns-Manville, National Gypsum
Owens-Corning Supply	Indianapolis	OCF, Johns-Manville

KEENE HAS DISCONTINUED CEILING OPERATIONS AT THEIR KALAMAZOO, MICH. FACILITY.

CONWED DISTRIBUTION CENTERS

Indianapolis Warehouse
Conwed Corporation
Twin-City Terminal Warehouse
4750 Kentucky Avenue
Indiana, IN 46241
317-856-3781 Tina Eaton

New Orleans Warehouse
Conwed Corporation
Calongne Drayage & Storage Co.
P. O. Box 10644
501 Coolidge
New Orleans, LA 70121
504-834-1700

Malloy Warehouse & Dist. Corp.
Conwed Corporation
P. O. Box 218
8290 National Highway
Pennsauken, NJ 08110
609-665-1080 Judy Vitrone

Memphis Warehouse
Conwed Corporation
Trammell-Crow Dist. Corp.
P. O. Box 2832
394 Titan Drive
Memphis, TN 38102
901-396-5401 Marybell

Bensenville Warehouse
Conwed Corporation
1006 Fairway Drive
Bensenville, IL 60106
312-595-2705 Shirley

Virginia Bonded Warehouse
Conwed Corporation
P. O. Box 427
Richmond, VA 23203
804-270-4037 Bob Bailey
804-232-8941 Deb McDaniel

Atlanta Warehouse
Conwed Corporation
P. O. Box 19673 Station N
Atlanta, GA 30325
404-355-0460 Kitty

Alliance Warehouse
Conwed Corporation
c/o Bill Clem Properties
P. O. Box 1911
1250 Asbestos
Alliance, OH 44601
216-823-1278 Lenore

Charlotte Warehouse
Conwed Corporation
Union Terminal Warehouse Inc.
P. O. Box 16306
Charlotte, NC 28216
704-394-1321 Debbie

Denver Warehouse
Conwed Corporation
Insulation & Ceiling Supply
4070 Globeville Road
Denver, CO 80216
303-222-0619 Rich Phillips

Dallas Warehouse
Conwed Corporation
Edwards Warehouse Company
2650 Manana Drive
Dallas, TX 75220
214-358-2464 Betty or Howard

East Rutherford
Conwed Corporation
320 Murray Hill Parkway
E. Rutherford, NJ 07073
201-939-3700 Jim Filler

Washington Storage & Dist.
Conwed Corporation
3101 Pennsy Drive
Landover, MD 20785
301-322-4333 June

Gillis-Hood Moving & Storage Inc.
Conwed Corporation
P. O. 9193
1310 So. Brazos Street
San Antonio, TX 78204
512-225-2836 Pat

Tampa Warehouse
Conwed Corporation
Burgess-Hood
4751 Distribution Drive
Tampa, FL 33619
813-248-6309 Linda

Winchester Warehouse
T. Tighe & Sons Inc.
36 Holton Street
Winchester, MA 01890
617-729-5440 Jo Glejoer

Dallas Office

FIRM	CITY	LINES HANDLED
Owens-Corning	Dallas	Owens-Corning Fiberglas, Johns-Manville
Owens-Corning	San Antonio	Owens-Corning Fiberglas, Johns-Manville
Owens-Corning	Oklahoma City & Tulsa	Owens-Corning Fiberglas, Johns-Manville
Owens-Corning	New Orleans	Owens-Corning Fiberglas, Johns-Manville
George Staten Company	Jacksonville, TX	Johns-Manville, Conwed, OCF
Standard Materials	Oklahoma City & Tulsa	Johns-Manville, Gold Bond
Conwed	New Orleans	Conwed
Tieman Sales	Dallas	Conwed, Acoustiflex
Construction Systems	Houston	Gold Bond, Celotex, Chicago Metallic
Owens-Corning	Houston	OCF, Johns-Manville, National Rolling Mills, Conwed
Donn Products	Houston	USG Board, Donn Grid
King Wholesale	New Orleans	Tile - USG and Celotex Board - OCF, Gold Bond, USG

Kansas City Office

Owens-Corning Contracting & Supply	Kansas City, MO	Owens-Corning, Johns-Manville, Conwed, USG (Quietone Line)
George Will Company (Natl. Gypsum Acoustical Contr.)	Kansas City, MO	National Gypsum (as wholesaler)
Golden Valley Supply Co. (Subsidiary of Acoustics Asso. Contr.)	Golden Valley, MN (Twin Cities Area)	Conwed, Celotex, Owens-Corning
Millard Drywall, Inc. (Subsidiary of Eliason & Knuth Drywall & Acoustical Contr.)	Millard, NE (Omaha) Grand Island, NE Des Moines, IA Denver, CO	USG, Celotex, Johns-Manville

Los Angeles Office

FIRM	CITY	LINES HANDLED
Owens-Corning Supply	Los Angeles	Owens-Corning Fiberglas
DiMarco	Los Angeles	Celotex
DiMarco	San Diego	Celotex
O'Malley	Phoenix	Celotex
Stanline, Inc.	Los Angeles	United States Gypsum
Stanline, Inc.	San Diego	United States Gypsum
Diamond "W" Supply Co.	Los Angeles	Johns-Manville
California Wholesale Plywood	Los Angeles	Conwed
Interstate	Denver	Conwed
R. W. Franck	Salt Lake	Conwed - Owens-Corning Fiberglas

New York Office

Ajax Smith	Buffalo	Owens-Corning Fiberglas
Allied Roofers Supply	Jersey City	Celotex
Giant Supply	Queens (New York City)	Celotex
J. B. Eurell	Rutherford	United States Gypsum
Jacobson & Company Supply Div.	Elizabeth	Conwed
Conwed Corp.	East Rutherford	Conwed
Elmwood Supply	East Paterson	Conwed
Conwed Corp.	Boston	Conwed
ISD (Harry Rich)	Union	Johns-Manville, Celotex & USG
Kamco Supply	Brooklyn	Johns-Manville, USG & OCF
All-Island Supply	Long Island	OCF, Conwed & Johns-Manville
Bradley and Bailey	Buffalo	OCF, National Gypsum
OCF Supply	Watertown, MA	USG & OCF
OCF Supply	East Hartford, CT	Johns-Manville, OCF & U.

403a

Philadelphia Office

FIRM	CITY	LINES HANDLED
Conwed	Riverside, NJ	Conwed
Va. Bonded Warehouse	Richmond, VA	Conwed
Owens-Corning Fiberglas	Berwyn, PA	OCF & USG
Owens-Corning Fiberglas	Columbia, MD	OCF, USG & Conwed
United States Gypsum	Baltimore, MD Columbia, MD	USG (This may now be controlled by OCF)
J. B. Eurell Co.	Lansdowne, PA	J-M, National Gypsum, USG
J. B. Eurell Co.	Richmond, VA	OCF, Johns-Manville, National Gypsum
Harry Rich	Cherry Hill, NJ	Johns-Manville, Armstrong, USG & Donn
Walter E. Campbell	Washington, DC (Beltsville, MD)	OCF, Johns-Manville, National Gypsum
Allstate Building Supply	Baltimore, MD	National Gypsum
Franklin Gypsum Supply (Subsidiary USG)	Wescosville, PA (Allentown)	USG (Except Airson & CDI)

St. Louis Office

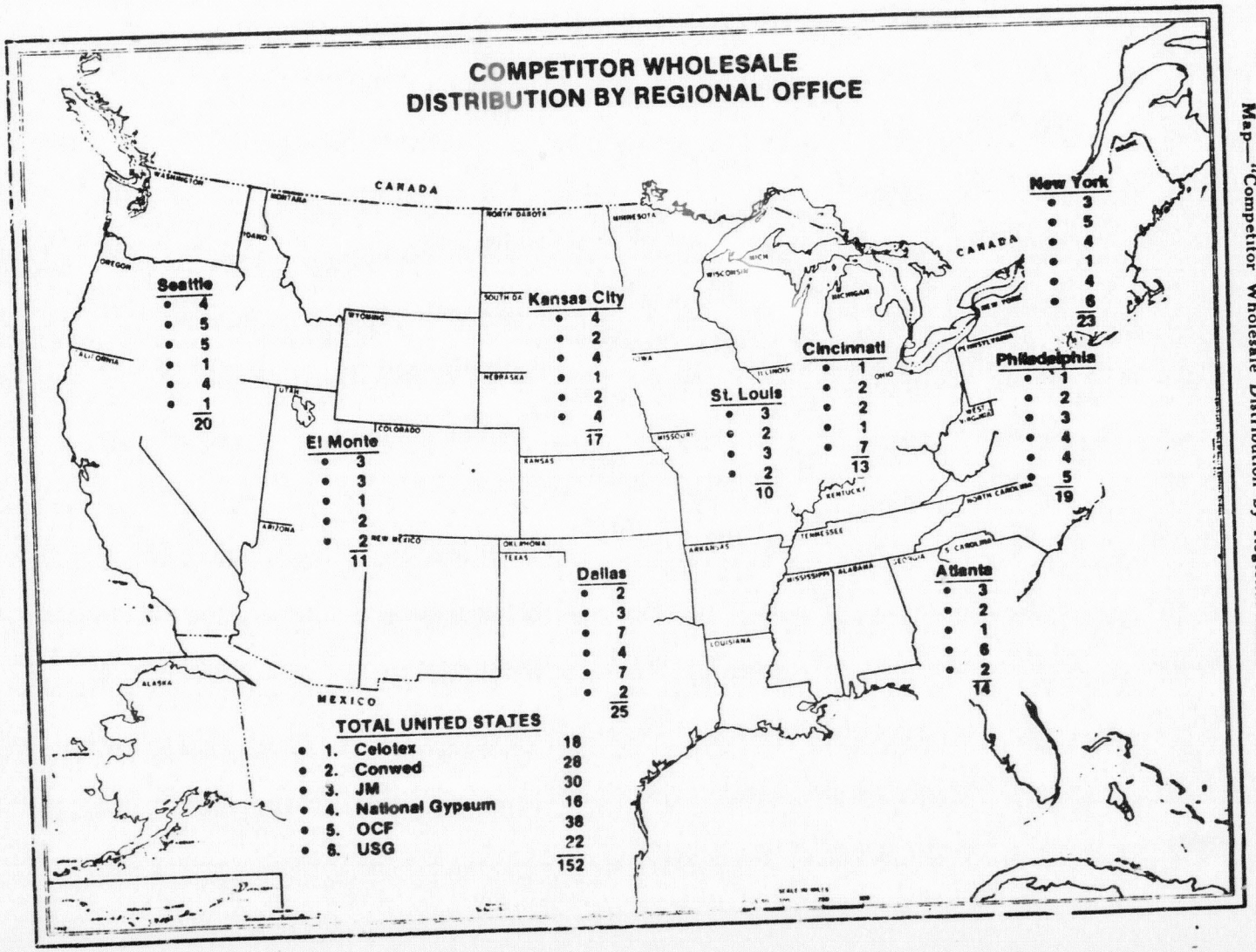
National Gypsum Company	Memphis & St. Louis	National Gypsum
Owens-Corning Fiberglas Contract & Supply	Memphis St. Louis Chicago (Elk Grove)	Owens-Corning Fiberglas Johns-Manville
Conwed	Memphis St. Louis Chicago	Conwed
Reinke Interior Supply Company	Chicago	Johns-Manville, National Gypsum (Tectum, Asbestos)
Chatham Supply	Blue Island (Chicago Suburb)	National Gypsum

Seattle Office

FIRM	CITY	LINES HANDLED
Owens-Corning Fiberglas Supply	San Francisco	Owens-Corning Fiberglas
Owens-Corning Fiberglas Supply	Sacramento	Owens-Corning Fiberglas
Owens-Corning Fiberglas Supply	Portland	Owens-Corning Fiberglas
Celotex Wholesale	San Francisco	Celotex
Stanline	San Francisco	United States Gypsum
Ceiling System Supply	San Francisco	National Gypsum
Ceiling & Interior Systems Supply (CISSI)	Seattle	Johns-Manville, Conwed
Owens-Corning Fiberglas Supply	Seattle	Johns-Manville, Owens-Corning Fiberglas
C.M.S.	San Francisco	Johns-Manville, Conwed, Celotex
"	Sacramento	Johns-Manville, Conwed, Celotex
'	Fresno	Johns-Manville, Conwed, Celotex
'	Redding	Johns-Manville, Conwed, Celotex

Exhibit FF Annexed to Affidavit of Phillip W. Unger

Map—"Competitor Wholesale Distribution by Regional Office"



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACOBSON & COMPANY, INC., : 76 Civ. No. 2376 (EW)

Plaintiff, : AFFIDAVIT

- against - :

ARMSTRONG CORK COMPANY, :

Defendant. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

J. E. SNYDER, being duly sworn, deposes and says:

1. I am Manager of the Philadelphia Regional Office of the Architectural Ceiling Systems Division of defendant Armstrong Cork Company ("Armstrong"). I submit this affidavit in opposition to the motion of plaintiff Jacobson & Company, Inc. ("Jacobson") for a preliminary injunction.

2. I have been employed by Armstrong for 40 years and have held my current position as manager of the Philadelphia office for 24 years. This office serves the region encompassing metropolitan Philadelphia, most of the rest of Pennsylvania, Delaware, Maryland, Virginia, parts of West Virginia and Ohio, and Southern New Jersey. The regional office is located in Wayne, Pennsylvania, just outside Philadelphia.

3. From March of 1968 to March of 1976, Jacobson was a appointed contractor-distributor for Armstrong ceiling products and other building materials in the New York City area, including Long Island and northern New Jersey. Armstrong's New York regional office presently is located in Saddlebrook, New Jersey and is managed by Mr. Richard C. Wiley.

4. My office, upon the request of Jacobson or of the Saddlebrook office has, on numerous occasions, given technical information or rendered services to Jacobson in regard to jobs Jacobson had going in the Philadelphia area. Each such request was given prompt and thorough attention by Walter Koenig, my architectural representative for metropolitan Philadelphia or by the Saddlebrook office. Jacobson's Philadelphia area jobs on which we provided such assistance include, among others, the Federal Courthouse, Penn Mutual Life Insurance Company, Children's Hospital and the Philadelphia Art Museum. Never did Jacobson request technical information or any type of service or assistance from my office and not receive it; we never refused a single Jacobson servicing request. And, on no occasion did Jacobson ever express any dissatisfaction whatsoever to my office in regard to the quality of services we rendered at its request.

5. There are presently five Armstrong contractor-distributors bidding and selling Armstrong ceiling products in the metropolitan Philadelphia area: Berger Acoustical Company, Inc. ("Berger") in Philadelphia has been an Armstrong distributor since 1951; Standard Acoustical in Lancaster since 1954; Union Wholesale in Wilmington since 1970; Fruscione Floor Covering in Trenton since 1972; and Duggan and Marcon in Allentown since 1951.

6. During the period Jacobson was a New York area Armstrong contractor-distributor, it from time to time expressed to me an interest in being granted an Armstrong contractor-distributorship in the Philadelphia area. Each time Jacobson did so, I was always willing to meet with its representatives and discuss their proposals. The meetings on March 4, 1970 and

April 18, 1972, referred to in paragraphs 16 and 23 of Mr. Jacobson's affidavit, are two such meetings. However, after listening and weighing carefully everything Jacobson had to say on the subject on each such occasion, I concluded that I was wholly satisfied with Armstrong's distribution in my region and felt that the business in the region did not warrant another distributor. Therefore, Jacobson was not granted a contractor-distributorship in the metropolitan Philadelphia area.

7. On no occasion did I discuss with Berger or any other Armstrong distributor in the metropolitan Philadelphia area whether or not to recognize Jacobson as an Armstrong acoustical contractor in the metropolitan Philadelphia area. Nor did Berger or any other Armstrong contractor-distributor in the metropolitan Philadelphia area ever state or request that Armstrong not recognize Jacobson as a contractor-distributor in the Philadelphia market.

8. Of course, the fact that Jacobson was not appointed as an Armstrong distributor in Philadelphia does not mean that Jacobson could not and did not bid or sell Armstrong ceiling products in the Philadelphia area during the time it was an Armstrong New York contractor-distributor. To the contary, during this time period Jacobson often bid and sold Armstrong products in the Philadelphia area. At no time while Jacobson was bidding and selling Armstrong's line in the Philadelphia area did my office ever object to any such Jacobson bid or sale, nor was any objection conveyed to my office by Berger or any other Philadelphia area contractor-distributor regarding such bids or sales by Jacobson. Jobs of which I am aware that were in fact performed Jacobson in the Philadelphia area using Armstrong products are also numerous and include Children's Hospital, Penn Mutual Life

Insurance, the Philadelphia Art Museum, Germantown Savings Bank and the Federal Courthouse among others.

9. In addition to its sales of Armstrong products into the Philadelphia area, Jacobson sold competitive products and I know that its sales of competitive products in the Philadelphia area were quite substantial. Indeed, in a periodic evaluation of Berger conducted in 1973 by my office, in answer to the question "[L]ist in order of importance the five top contractors in the market including [Berger]," Jacobson was listed second after Berger. A copy of this report is annexed hereto as Exhibit A. Jacobson's importance as a contractor in Philadelphia naturally diminished after Jacobson, by its own decision, decided to close its Philadelphia office in 1970. No one in my office ever discussed the closing of its Philadelphia office with Jacobson, but we were surprised when it occurred, because of its substantial sales volume in Philadelphia at that time. I understand that the closing of that office was the start of a general "retrenchment" program on Jacobson's part and that Jacobson subsequently closed its Long Island, Cherry Hill and New York City offices as well as let go the bulk of its sales force and personnel.

10. I was informed, after its occurrence, that Jacobson had been terminated as a New York area Armstrong distributor in March of this year. Prior to the date of this termination, I neither knew that Jacobson was being terminated nor that its termination was even being considered. Thus, I certainly could not have and did not discuss Jacobson's termination with Berger or any other Armstrong Philadelphia area contractor-distributor before it occurred. Moreover, on no occasion did Berger or any

other Armstrong contractor-distributor in Philadelphia ever state
request, or even suggest to my office that Jacobson be terminated

J. E. SNYDER

Sworn to before me this

7th day of June, 1976.

Notary Public

MARGARET C. MILLER
Notary Public, State of New York
No. 24-4519940
Qualified in Kings
Certificate Filed in New York
Commission Expires March 30, 1978

Exhibit A Annexed to Affidavit of J. E. Snyder

Ceiling Systems Contractor Inventory Form—Berger Acoustical Co., Dated February 6, 1973

CEILING SYSTEMS CONTRACTOR INVENTORY FORM

412 a

PHILA. Regional Office Date 2/6/73

Firm BERGER ACOUSTICAL CO. Location BENSALEM PA.

A. Finances

1. Is credit at present a problem in our relations with this firm? NO

2. In your opinion, has ceiling activity returned satisfactory profits to the firm? YES

3. How does our Credit Department rate the firm? OPEN

4. Do they have the wherewithal to double their business in the next five years? Yes X No ____

B. Management

1. Is the owner active in the business? YES

2. Is the owner personally engaged in directing ceiling activity? YES

To insure continuity of the business, is planned succession of management evident? NO

3. What is your objective opinion of management's ability? Good ✓

Fair ____ Poor ____

4. Do ceiling sales account for more ✓ or less ____ than 50% of total volume? If less than 50%, specify dominant interest: ____

5. Does the firm have a good reputation as a subcontractor in the local construction industry? YES List in order of importance the five top contractors in the market including this firm ① BOSER ② JACOBSEN ③ MOYER ④ JONES ⑤ AMERICAN

6. Does firm have a separate ceiling systems department NO or specialized ceiling salesmen? _____ If not, does the lack of specialized management or departmentalization prevent achievement of satisfactory volume? NO

7. Does individual responsible for ceiling sales have other responsibilities? YES If so, please specify other duties, and/or products involved: PARTITION SALES

8. Is firm properly staffed to estimate, sell, and install a satisfactory volume of ceiling systems? YES Is personnel adequate to estimate all jobs out for bid at all times? YES

9. Are job costs carefully kept analyzed? YES

10. Is firm qualified to do lighting design? YES HVAC layout? YES

11. Identify competitive ceiling lines handled by this concern and percent of purchases. OCF, CELOTEX, TM TOTAL 5% OF

12. Does account promote or sell another integrated ceiling system package? No If so, whose? _____

13. Is warehouse presently adequate to maintain a workable inventory of our products? YES Is it adequate for future stock requirements as volume increases and our product line increases in variety?

No- LAND AVAILABLE FOR EXPANSION

C. Sales and Promotional Activity

1. Are architects called on? Seldom Adequately? No

Building Owners? Yes Adequately? No

Industrial Accounts? Yes Adequately? No

2. Are contract jobs bid and forgotten No or aggressively followed _____ until definite outcome known? Is a systematic, formal follow-up program employed? YES

3. Are efforts made to close worthwhile contracts, particularly on large jobs, by negotiation? YES Are key men skilled in negotiating techniques? YES

4. As preliminary construction plans are announced for major jobs, does the firm follow-up with architects, engineers, and owners, including mock-up installations of proprietary Armstrong materials when necessary?

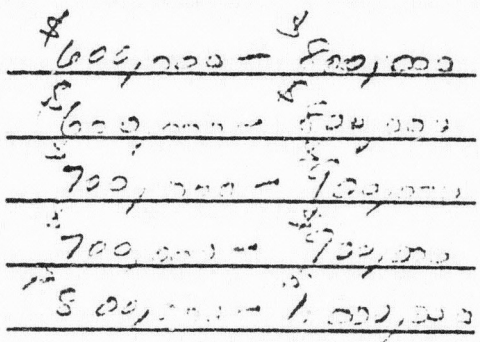
YES

5. As new and proprietary products are introduced by Armstrong, does the firm promote them promptly and with enthusiasm? NO

Cooperate in Armstrong promotional programs? YES

D. Sales Growth

1. What are the estimated purchases for the next five years? (Be realistic.)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JACOBSON & COMPANY, INC.,

Plaintiff,

-against-

ARMSTRONG CORK COMPANY,

Defendant.

- x

76 Civ No. 2376

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD C. WILEY, being duly sworn, deposes and says:

1. I am Regional Manager of the New York Region of the Architectural Ceiling Systems Division of defendant Armstrong Cork Company ("Armstrong"). I submit this affidavit in opposition to the motion of plaintiff Jacobson & Company, Inc. ("Jacobson") for a preliminary injunction.

2. I have been employed by Armstrong for 24 years and have held my current position as manager of the New York region since January 1, 1971. This region encompasses the New York City area, Long Island, New York State, Erie, Pennsylvania, Northern New Jersey and New England. From March of 1968 to March of 1976, Jacobson was an appointed contractor-distributor for Armstrong ceiling products and other building materials in the New York City area, Long Island and Northern New Jersey.

3. So as not to be repetitive in this affidavit, I have read the accompanying affidavit of Phillip Unger and fully concur with the statements made therein. However, I would also emphasize some additional points not covered in detail by Mr. Unger.

contracting operation, with offices in New York City, Plainview, Long Island, Elizabeth, New Jersey and Cherry Hill, New Jersey; warehousing facilities at Plainview and Elizabeth; and a large commissioned sales force numbering over 20, with responsibility to close any available ceiling job.

5. Beginning in 1973, however, after John Jacobson took over the active management of the firm, there was a shift in Jacobson's organizational emphasis, the result being that Jacobson concentrated on larger jobs to a much greater extent than it previously had, virtually ignoring smaller jobs. Structural changes in the organization whereby its facilities and personnel were drastically reduced accompanied the institution of its new business philosophy.*

6. To begin with, Jacobson's New Jersey organization switched from a company having a commissioned salesman in every county who bid almost every job, to a sales team which worked entirely on a salary basis and which followed a policy of not bidding jobs under $50,000 in value. By the end of 1974, there were no Jacobson field personnel active in northern New Jersey, and there was virtually no pursuit by Jacobson of jobs located in New Jersey. In 1975 Jacobson closed its Cherry Hill office, and by late 1975 only one individual was left in the Elizabeth warehouse, and he was then involved only in Jacobson's wholesaling activities.

7. In late 1973, three Jacobson employees in its Long Island office were fired for alleged theft, and this began the destruction of Jacobson's organization on Long Island. Other employees were then terminated, and by June of 1974 the decision had been made by Jacobson to close its Long Island branch.

8. Beginning in late 1973 to early 1974, Jacobson also

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* The concomitant rise in specious complaints and threats of litigation by Jacobson is amply discussed by Mr. Unger.

became interested in only the biggest jobs in New York City and Westchester County and, in my view, became significantly less attractive to general contractors and continually lost customers as a result. Jacobson even ignored smaller jobs where a specification was developed solely for Armstrong material. Jacobson als has refused to bid renovation work, which has been an area growin in significance in the New York area in the last few years. I understand that Jacobson recently has closed its New York City office.

9. On numerous occasions since 1973, various Armstrong personnel have urged Jacobson to bid smaller jobs, especially where a proprietary specification existed. Bruce Koehn, in particular, complained vociferously to Messrs. Sweetwood, Miller and Groomes of the Jacobson firm with respect to the lack of pursuit of smaller jobs, and Paul Langan and Bob Baram also voice severe criticism in this regard. Indeed, when Jacobson was informed in 1975 that Claremont Systems was set up as an additional Armstrong distributor in Northern New Jersey, primarily because of Jacobson's failure to actively pursue the broad range of work in that area, Jacobson's response to this was that Armstrong did not have to "apologize" because Jacobson had no interest in anything but "big ticket items."

10. In short, when Jacobson became an Armstrong distributor it had 4 offices, 2 warehouses and numerous commissioned salesmen and personnel agressively selling and promoting to a broad spectrum of jobs and customers. In contrast, at the time of its termination: (a) there remained only one office and one warehouse; (b) about 15 salesmen and other employees had been either fired or "let go"; and (c) Jacobson was refusing to even consider anything but very large jobs.

11. The severe Jacobson office and personnel cutbacks and its refusal to consider smaller jobs were emphasized in the annual New York and New Jersey territorial reports for the year 1975, prepared by my employees Robert A. Baram and Paul R. Langan, respectively. My office regularly prepares territorial reports for New York and New Jersey in January-February of each year discussing the sales of our distributors for the preceding year. The reports for the years 1974 and 1975, prepared in January-February 1975 and 1976, respectively, accurately reflect the demise of the Jacobson organization during those years. Those reports are annexed hereto as Exhibits A through D.

12. Moreover, Paul R. Langan, in his 1975 memorandum, entitled "Long and Short Range Plans New Jersey," annexed hereto as Exhibit E, recommended the termination of Jacobson as early as spring 1975, because of the drastic cutbacks and failure to bid all but the largest jobs that were already quite evident when the memorandum was written.

13. As to Jacobson's claims that my office failed to quote prices on and service its Philadelphia jobs, I must voice strong objection. During my entire tenure as regional manager, my office frequently and continuously obtained special pricing information for Jacobson jobs located both without as well as within the region for which I am responsible. When the job in question was in the Philadelphia area we would call our Lancaster headquarters to obtain the applicable special price. Similarly, where technical assistance and services were required by Jacobson on a Philadelphia job, such needs were met by my office. If our office believed that assistance from our local Philadelphia office was necessary in addition, we would ask the Philadelphia office

for their assistance. This assistance by our Philadelphia and New York offices included discussions with local Philadelphia architects on Jacobson's behalf with respect to technical matters, although we view it as the responsibility of each contractor-distributor to establish its own relationships and contacts with its customers and others. In any event, we never refused pricing or servicing assistance requested by Jacobson, no matter where the job was located. Indeed, the number of jobs my office either priced and/or serviced for Jacobson in the Philadelphia area are quite numerous and included, among others, Gimbel's Department Store, the Federal Court House, Penn Mutual Insurance Company, Neshaminy High School, Children's Hospital, Jefferson Hospital and the Philadelphia Airport. One of my architectural representatives, Bruce Koehn, estimates that during his employment at the New York office from 1972-1974, of the time he spent on the Jacobson account, 5-10% was spent on Philadelphia area jobs. Paul Langan and Ned Underwood of my office also provided significant assistance to Jacobson in the Philadelphia area. The plain fact is that my office did pursue Jacobson's Philadelphia area business, and it was in our interest to do so, since we received half the credit on all such business.

14. I would also like to respond to paragraph 37 of Mr. Jacobsor's affidavit, where he uses the Texaco Building in Purchase, New York, as an illustration of the supposed fact that without access to Armstrong products Jacobson will not be able to secure jobs. His characterization of that job is simply false. The specifications on the Texaco Building were for Armstrong ATS and Travertone, but allowed for the use of substitute competitive products. Jacobson in March of 1976 had requested and received prices from my office for the Texaco job. Then, a few

weeks ago, after the termination of its distributors [illegible] called my office and informed us that unless we lowered the Travertone price we had quoted, it intended to utilize, as an acceptable alternative, either U. S. Gypsum or Celotex products because it had received a better price for the competitive products. In order to be more competitive with those prices, we lowered the Travertone price we had quoted Jacobson (and to which he had agreed), and only then was Jacobson satisfied with the Armstrong products.

15. Further, I must disagree with the statements in Jacobson's Memorandum that the termination will cause Jacobson to lose customers and employees and thus suffer irreparable injury. First of all, as stated above, Jacobson reduced its personnel to skeletal size while an Armstrong contractor. I cannot see how the termination will cause it to lose additional employees. Second, with regard to its prediction of loss of customers, I cannot foresee this happening to Jacobson either. As is discussed in detail by Mr. Unger, Jacobson remains a full-line contractor, able to bid and sell virtually every major job.

16. Finally, I must note that after eight years of very frequently listening to Mr. Jacobson and others from his firm tell me that if we did not lower a certain quoted price, they would turn to any one of several competitive substitutes, all of which would be perfectly adequate, I find Mr. Jacobson's assertions to the effect that his failure to obtain Armstrong products will cause his firm irreparable damage, to be most ironic.

Richard C. Wiley
RICHARD C. WILEY

Sworn to before me this
9th day of June, 1976.

Mary Louise Sabo

[illegible] New York
Qualified [illegible] New York County
[illegible] March 30, 1978

Exhibit A Annexed to Affidavit of Richard C. Wiley

Memorandum from Richard C. Wiley to Phillip W. Unger,
Dated April 9, 1976 and Territory Analysis Supplement—1976

422 a

INTER/OFFICE COMMUNICATION — Armstrong

To P. W. Unger, Arch Clg Sys Div, Lancaster

April 9, 1976

From R. C. Wiley, Arch Clg Sys Div, New York

Subject Northeastern Regional Office
Territory Analysis
1975 Supplement

Attached are our Individual 1975 Territory Analysis Supplements as you requested.

Also, we call your attention to Langan's and Baram's report and their comments on Jacobson & Company. While you are getting these reports in April they were actually written and typed up in early February. You will want to copy the pertinent pages or the whole thing and get a copy up to Legal.

MAK

Enc.

FORM 1501 4-71

NO ENVELOPE REQUIRED

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TERRITORY ANALYSIS SUPPLEMENT - 1975

I. The Market

There have been several major changes in the New York City territory since last year. Two, in fact, are very significant.

The first major change is the virtual halt to construction in the public sector. Due to the fiscal problems of New York City and New York State numerous construction projects of a public works nature have either been cancelled or halted in various stages of construction - - - from 50% to 75% complete. They include Public Schools, high schools, colleges, libraries, etc. The dollar figure on these projects is staggering. About the only public dollars available for new construction is in the health care area and even there the money seems to be drying up as the wheel of construction grinds to a halt. The only work we will see in this sector, unless "new" money is found will be in the area of renovation - - - and even there the dollars are hard to find.

In the private sector the market has also changed but maybe not so drastically. I would not like to be a structural steel salesman at this moment in New York City because new construction is probably overbuilt by some 30,000,000 square feet depending on whom you believe. Nevertheless, this 30,000,000 square feet represents footage that must be installed eventually. In addition, as older buildings become more and more in disarray they will need renovating so perhaps things are not all that bad. The name of the game in the public sector has changed however from new, high-rise construction to renovation - - - and I think we have the products and contractor personnel to meet this new challenge.

II Contractor Personnel

We have not aided any local New York City contractors over the past year. However, there has definitely been a change in their efforts over a years' time.

First off, Associated Ceilings came through with a good performance - - - what we expected of them - - - of $132,279 which is slightly over their budget of $130,000 that I set for them last year. More importantly, they "grew" in '75 by adding an estimator and "promoting" a few jobs.

Scully gave us one hell of a good year. They improved 18% over 1975 and came in just under their assigned tonnage of 4[illegible],000. They have a couple of major jobs and, very importantly, do a real good over the counter volume. In fact, since I started handling them, I have become amazed at all the material Jim Scully runs over the counter - - - particularly, goodies like Soundsoak and Antique Glass.

Gunnion fell off 2% in 1975. I see a possible problem here in that although everyone in the company is accessible and approachable, their main man, owner-President Jim O'Brien is virtually never available to anyone, including his own personnel.

National, although falling off 4%, still had a respectable year. They lost a member of their management team in January of 1975 when Harry Stuhr retired. The firm is now run by Dan Alessio and Joe Lynch with Don Lowes a minor partner acting as the new purchasing agent. Jack Teahan is also a minor owner. The rest of the staff is Bill Brooks and Dennis Duncan. National is still a good solid Armstrong contractor despite their anti [illegible] toward our Colonnade tile and lack of promotion of our mat vinyl

U.S.G. and Conrad have been calling on them with little success. Our price and service is still good. Nevertheless, in two years we have, with higher prices, gone from $537,000 in 1973 to $407,000 in 1975. That is a slippage of $130,000.

Phillips - nice guys but they are tricky and foxy. Bob Phillips wants to know everything about everybody but talks little about his activities other than to complain about something. Jim Phillips is a gentleman and very knowledgeable. All in all they are decent people but you can't fully trust them. the best guy in the firm is Ted Phillips who is young, aggressive, sale-oriented, promotion minded and amenable to suggestion. Also, Phillips, when they hear of a "good deal" will go along with it. As a result they purchased $10,900 of Soundseal. How many other contractors could say 13% of their (sic) purchases was Soundseal. Of course, we are dealing with nearly nothing on '75 purchases.

I see them much stronger in 1976 with Broadway Plaza the main factor.

Tom Maguire is always very helpful, as usual.

Since Phillips 1976 strength was Olympic Tower, it looks like every other year they are doing a fair job of it.

Jacobsen was nowhere in 1975. Their entire organization was decimated. Their Long Island operation died with the departure of Hank Eckstein. Their New York staff was cut to the partners and 3 estimators.

I see Jacobsen as a very small factor - - - like a James A. Phillips - - - in the future - - - but they will survive.

John Doe has a material distribution center in Elizabeth in 1975 that has shown some spark of late under the direction of Phil Miller. Warren Wells was named a Vice President of the firm in 1975.

Marsh - we are having some problems with Circle in that they are trying to put their price on our goods. Jim Smith remains the key purchasing influence. Harry Grey is the day-to-day purchasing agent. Larry Barden has been let go. Circle has pulled in their belts by retrenching to a new location at Baldwin Street in the Bronx - - - a sign of the times for them. They do not have a very large backlog. Many people have been fired. They are difficult to deal with at times and yet they still have that great ability of coming up with the big job. Don't underestimate them. They are still No. 1 but need some help. They have been shopping other manufacturers of late - - - namely U.S.G. They are still pretty solid Armstrong although I'd be careful how hard we push them. Surprisingly, their purchases were up 37% last year from 1974 to $[illegible]. This is, of course, below their 1973 high of $1,200,200. Nevertheless, not a figure to be sneered at.

III. Competitive Contractors

Gilbert Phillips for awhile was making tremendous waves in our marketplace. Now, it appears he may no longer be a large factor. He is having grave business financial problems. His staff has been cut - - - his main supplier (U.S.G.) has liened one of his jobs for non-payment. Indian, Helen, etc. continue to take their share of work. [illegible] is in financial trouble. Smaller contractors are doing some renovation work but not making too great an inroad vs. our "big 7".

427 a

IV. Architects

Some of the smaller architects (list available on request) and Interior Designers are doing quite a bit of renovation work with the large firms laying off personnel.

Ken Ross New York City Interior Designer and Durry Wilke New York City Interior Designer are good Sounisoak users.

SOM - user of Antique Glass, RBB continues to spec. All Armstrong, etc. stronger and stronger inroads with architects and designers are being made.

lcl

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Exhibit B Annexed to Affidavit of Richard C. Wile,

Territory Analysis Up-Date by Paul R. Langan

TERRITORY ANALYSIS UP-DATE

P. R. LANGAN

Perhaps the most important in the New Jersey territory over the past year, has been the ste p decline in business opportunity. Many of the changes that have taken place, reflect this overall developments.

The most drastic change in our contractors organization has taken place at Jacobson & Company. They are no longer actively bidding out of their Elizabeth office, and this has resulted in an empty backlog for 1976. Hopefully they will be making some sort of comeback in 1976. They plan on moving all the company operations from New York into the Elizabeth office by this summer. John Jacobson has made it a company policy to bid only on "big work". (which is a problem in itself; there is no "big work") In keeping with this idea, they have issued pink slips to the remaining salesmen from the Elizabeth office. Pat O'Malley left in December '75 (Now with Span-Coustic in Trenton) and Bob Wagner will be officially terminated as of February 29, 1976. They have joined with, Sam Epstein Dick Starkie & Jack Dunigan as ex-Jacobson employees in New Jersey during the past year. Phil Miller is the only salesman left and he has been working exclusively as administrator of Jacobson Supply Division. This has been Jacobson's version of Harry Rich's I.S.D. operation. They are operating with a functional discount from Conwed, but rely very heavily on the re-sale of Armstrong material for their sales volume. Due to the fact that their last ceiling job is just winding up, all purchases of Armstrong will be used to stock this operation. As of this writing, Jacobson is not a factor among New Jersey ceiling contractors. They have not closed a job in the last year and are no longer relied upon by local general contractors for prices

At Sloan Acoustics, there have been some personnel changes. Mark Fowler, who had been handling purchasing for the firm was fired in May of '75. He was replaced by Carmen Santillo who had been estimating Dry Wall for Germinario Acoustics. He had been able to add some organization to the firm until he was moved from his position as purchasing agent to superintendent at the A T & T Long Lines job. Mark Fowler was let go, because of the repeated problems in coordinating and managing, and performing the numerous amount of jobs they had under contract. It's my feeling that he was merely the scapegoat for the lack of management that this firm continues to suffer from. The other major change is that Jim Bush, the salesman for the southern part of the state, has formed his own company, Acoustical Specialties, Inc. This has been a severe blow to Sloan Acoustics. The southern portion of the state has been vacant since January 1st and at this point they have not made arrangements to replace him. It appears as though he'll be stiff competition for Sloan in the south. He has maintained his contact with his general contractors customers and has already been awarded some contracts that would have gone to Sloan.

The firm is no longer taking the high percentage of available work as they did in 1973 and 1974. Pete Shanley has given me some indication that Carmen will be going after some dry wall to make up for the loss of volume in ceilings. I feel this to be a mistake. They still have overcome their problems of lack of management and communication.

Since Sloan is no longer gobbling up the percentage of ceiling contracts that they have been, someone else is. That company is Harry Rich Affiliates. During this past year, they have become much more aggressive in their pursuit of ceiling contracts. The change in attitude appeared to be developing early in 1975, but one event of last summer seems to have ignited the spark

in their hard drive to get work. Harry Rich sold his holdings in the business.to the employees.

The entire turnover is much too detailed to go into, and I don't know all the angles, but the basic idea was so Harry could get his money out without having high tax rates to cope with. The new organization has a new power structure. Leslie Kovac is now the President, Henry Greenstein the Executive Vice President, Danny Gold the Secretary Treasurer and Senior Vice President, and Manny Nagle has been eased out of the decision making to become Chairman of the Board. The rest of the employees also have stock in company and share in the profits. This has helped ease a lot of dissension that developed between Harry Rich sales personnel and I. S. D. The salesmen benefit from the profitability of the "whole" organization.

I. S. D. has continued to show a profit for the Rich organization. They have now taken on the Celotex line for the Delran operation; and have continued to service many of the medium size and smaller contractors throughout the state. Many of the Harry Rich purchases of Travertone have gone to stock I. S. D. and their sales.

The Harry Rich organization is now handling our Industrial Noise Products. Mark Fowler (formally with Sloan) is running this operation, but it has been slow to get off the ground. No companies appear to be willing to invest any money at this time.

The major change at A & M Contracting has been their move into larger offices with much greater warehouse facilities. This was a definite plus for this firm. They now have the capacity for doing more volume. Other than that, they have continued to be our most consistent and loyal customer.

We added a new contractor in Bedminster, New Jersey, Claremont Wall Systems. This firm bids work mostly in Mercer County and the Southern and Western counties. They ar an affiliate of Claremont Painting and Decorating which has been an established painting contractor for years. John Jasterback, the Vice President of the company, is in charge of Dry Wall and accoustics. The Presidents is Dominick Sciaretta and the Treasurer, Nick Cirignano are two important factors in the business. Although neither plays a very active role in ceilings, you are extremely aware that they hold the purse strings. The ceilings business has three sales estimators (George Danielson, Bob Donald & Bob Scamorza), none with strong experience in accoustics. The basic reason is, they are dry wall people now attempting to develop a strong ceilings business. They have done some large dry wall jobs, A T & T in Basking Ridge and Nabisco Global Headquarters. At this point, I am expecting only about $75,000 worth of business in 1976. But there is some definite evidence that we can look to them as having some strong growth potential. They are geographically located in an area where there has been rapid growth in construction over the past few years, and where it appears this trend will continue (they are not more than 5 miles from the two A T & T complexes). The organization itself is very strong and efficiently run. The only drawback is the need for an individual responsible for only ceiling contracts. I am convinced this firm is maybe two or three years from becoming a very strong firm in our distribution system. It is one of the few contractors with strong growth potential.

There have been no major changes in competitive contractors. There has been no strong growth demonstrated by any contractors. Still, many small, very low overhead, organization popping up. Some contractors are on the decline

Most notably, Acoustics, Inc. has become much less aggressive on ceilings, and seems content to concentrate their partition business.

One firm to follow is Acoustical Specialties, Inc., the firm Jim Bush (Sloan Acoustics) has opened up. He has already demonstrated his ability to close work and is located in an area (Red Bank) where we could still use a some coverage by a local contractor.

The wholesale distribution business has continued to develop spurred on by the success of I. S. D. and other wholesalers, and the growing number of very small contractors, more manufacturers have decided to go this route. Conwed has given a functional discount to Jacobson Supply Division in Elizabeth, J. B. Eurell in Hackensack handles and in a strange move, U.S.G. has given its line to O.C.F. Supply in Harrison. As previously mentioned I.S.D. now handles Celotex in Delran. At this stage of the game, there may almost as many wholesalers as there are contractors. Yet, the other manufacturers keep looking to add to their wholesale distribution, merely duplicating their coverage.

When construction starts dropping off sharply, many architectural firms were the first to feel the pinch. The Grad Partnership has suffered through many lay-offs, with very little new work. Merchant, Voorhees, and Rose another large firm in New Brunswick is suffering through the same drought. Most hard hit are those firms that have specialized in schoolwork, as the bottom appears to have dropped out of that market. The only firm that has grown has been House, Dubin & Ventura in Tenafly. This is mainly the result of the transfer of their New York operation to Tenafly.

Along with everyone else, general contractors in New Jersey have had to adapt to the business conditions. There haven't been many bankruptcies but moreso large scale lay-offs have occurred as companies try to trim overhead. Most generals have adapted and are now going after much smaller work, and bid lists hav quadrupled.

Only two developers continue to build and expand. They are Hartz Mountain Industries and Mack Construction both of whom do almost exclusively spec buildings and work most regularly with Harry Rich Affiliates.

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Exhibit C Annexed to Affidavit of Richard C. Wiley

Territory Analysis, 1974 Up-Date by Robert A. Baram

Robert A. Baram

TERRITORY ANALYSIS

1974 Update

New York City

The major overall change in the City of New York is that we are faced with a tremendous over-supply of office space that is sometimes estimated at up to 30,000,000 square feet of empty office space. I think that figure is exaggerated to some extent but suffice it to say that we have more than we need. Thus, we will not be seeing new, large construction projects like the WTC, or Olympic Towers or #1 New York Plaza for awhile.

The "new game in town", therefore, is called renovation. When a tenants lease is up he has a choice of moving to a new location, which will need interior products or staying in his old abode and asking the owner for a new ceiling and/or carpet or floors. Either way, we can cash in on this market if we have the right horses; and we do to some extent.

National, Superior, Scully, and Phillips are all involved in renovation as well as our cousin in Great Neck - - - Associated. He also does some New York City work as does Island and Donaldson. Nevertheless, we have lost Jacobson as a renovator in New York City on smaller projects and from all of the aforementioned contractors we are not getting too great an effort on our renovation products except from Associated and Superior.

We are getting action, though, from such people as Universal, Action Wall[illegible]ishers, Potmor, and Partition Services. These non- (Armstrong) people are going out and moving, to a small extent, our products. And yet, we have no real day-to-day method of reaching them and hundreds of others.

Thus, as a major change in New York, I think the City is now at the stage where we are ready for wholesaler distribution through the addition of All Island Supply. I think the business has shifted to the smaller contractor and industrial user and the way to reach him is via the wholesaler route.

This would be in line with a dual distribution policy of selling the larger contractor and then being able to reach out to the smaller user of our product.

The tight money policy also indicates that our contractors are cutting their inventory as much as possible so that a wholesaler in the territory will be helpful to them in that an outfit like Associated can pick up 50 cartons of an item rather than jamming up a warehouse with full Armstrong truckloads. Jacobson and Company in fact, recognizing the situation, has opened a wholesale branch out of Hillside, N. J. a la Harry Rich an Unite[illegible]

TERRITORY ANALYSIS (continued)

1974 Update

But I don't feel that a contractor, Johnny Jacobson come-lately operation is the answer. We need someone who is only in that business and understands and knows the business. Thus, a specific wholesaler operation is in order.

One other major shift in New York City is that Jacobson is now basically a bid shop. They are no longer going after "small work" but will concentrate on large projects in addition, they no longer have promotional salesmen out on the street. All of their closings and sales are handled by three people - Sam Schenzer, John Jacobson and John Higgins. Their estimating department is headed by Warren Watts. They underwent a major shakeup in 1974 in order to aid overhead and stay in business. They are now attempting to run their business much like a Circle Acoustics.

1975 will see the emergence of a familiar face full time into the New York City market. Gil Phillips has established a New York City branch with a full time individual at 101 Park Avenue in New York City. The person running the show is Ralph Baker who doubles as defensive captain of the New York Jets Football Team on Sundays. Gil can give us some trouble with his promotional efforts and the Delta/Glacier System.

National Acoustics will shortly have a change in their organization for 1975. Henry Stuhr will retire from the organization on 1-31-75 and will be replaced by Donald Lownes as far as the purchasing function is concerned. Hopefully, Joe Lynch and not Don Alesio will get controlling interest in the corporation.

Long Island

The year 1974 saw the closing of the Jacobson and Company operation on Long Island. This move had been talked about for a long while but it was inspired by the theft occurence of major proportion in which the buyer (Don Pagano), construction manager (Tom Colosanto), and salesman ([illegible]) were involved. After discovery of wholesale theft, John Jacobson decided to implement his plan and close the operation.

We added contractor in mid 1974 who is located in Great Neck and does work in Brooklyn and Queens - - - Associated Ceiling Company. Associated is composed of two brothers who grew up in the Brownsville section of Brooklyn - - - Arnold (40 yrs. old) and Irving (44 yrs. old) Butler. Their bookkeeper is named Betty (a sister) and their construction super a close personal childhood friend of the boys - - - Joe LaRocca.

The brothers have been in business 17 years and are quite successful even if the dollars are not in the business. They dabble in real estate and own a diet food supermarket in Connecticut which is operated by Arnold's wife.

1974 Update

Both partners are sincerely nice people but tend to be very sensitive at times - - - particularly to the credit department. One literally has to handle these guys with kid gloves.

They have a very close personal relationship with Al Swerdlik of Kamco Supply - a wholsaler - which has helped us do some back door business with Kamco on occasion, I look forward to seeing this relationship grow in the future.

We have also added back to our Long Island family of contractors Donaldson Acoustics. We did business with Donaldson for many years until we shut them off in 1968. The business is now run by Jim Donaldson, Jr. and it would appear he does a good job of it as this outfit has a good backlog.

Jim has several salesmen out calling on customers including Bob Donaldson, Al, James, and Tony Calvanese.

I look forward to a good relationship with sports enthusiast Jim Donaldson.

Island Acoustics is going to have a new address by the end of the year and we may be able to increase our volume with them. They have added Hank Eckstein formerly of Jacobson since last year. Hank is a good promotional salesman.

Gil Phillips has added Jerry Glynn to his Long Island staff. Gil continues to be my most severe competition on Long Island. He basically has a lot of the large architectural firms under his wing. You can almost smell it that "something is rotten in Denmark" but one cannot prove it.

The Long Island situation is tough as far as work. There are very few one and two family houses being built due to tight money and large scale unemployment. As a result, there are even fewer shopping centers going up. Money for schools is non-existent. Even if it were, the population has settled somewhat and all that is needed by way of schools is renovation of existing space.

All Island Supply, a wholesaler, continues to be a major factor on the Island as far as the Industrial and School replacement market.

Westchester County

Bell Acoustics gave us a disappointing year in 1974 as we had to cease shipping materials to them in mid year. Their prospects are less than bleak. We finally pulled out the business in July. Chuck is left floundering around and it does not look like we will collect $22,000 from them.

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TERRITORY ANALYSIS (continued)

1974 Update

We will probably add Dick Colonna and Westchester Acoustics this year. He should help bring us to a sizable ($135,000) volume when combined with Bill Doyle.

However, we still should be getting more volume out of this large county. Here again, we have the products that are a natural for wholesales distribution we can reach the many large corporate office holders up here who sometimes do in house work such as IBM and Pepsi Cola.

Westchester County has several hospitals and schools pending so things are not as bleak here as Long Island.

Hopefully, with the addition of W/A the county will be a free child and not continue as a New York step child.

Our severest competition up here is again, Bill Shannon of Gil Phillips Organization.

Exhibit D Annexed to Affidavit of Richard C. Wiley

Territorial Analysis, January 1975 by Paul R. Langan

Paul R. Langan 438 a

TERRITORIAL ANALYSIS

January 1975

Saddle Brook Territory

The slowdown of the construction industry in New Jersey has grown worse through 1974 and the situation seems to be worsening prospects for 1975. The unemployment figures for New Jersey are running well ahead of the national average. The relationship of our customers to the business is not going to help much. The major shake-up has been with Jacobson & Company.

Jacobson & Company has been totally re-organized. They no longer are actively bidding work out of Elizabeth. The company is still controlled by the personnel in New York City; John Jacobson, President, Vice President, Neal Jacobson; and Sam Shanrer, Vice President. What they have decided is to terminate their Plainview, New York Operation, and drastically cut back personnel in Elizabeth. They no longer do any estimating and bidding out of Elizabeth branch, that is handled by the New York Office. It is obvious that they had to cut back much of their overhead in order to continue in this business. This situation came about because of the very aggressive bidding tactics by Sloan Acoustics. By cutting back their personnel they have also abandoned the promotional aspect of the business, seeing as though they have no one left to promote. All their purchasing out of Elizabeth is done now by Bob Wagner, formally part of the S.E.C. Team. Richard Starkie has left Jacobson to accept a position with Special Section in New York, and Sam Epstein has also departed for another position. Pat O'Malley is the only other individual still there in some capacity, as more of construction manager, Al Sweetwood, Charlie Grooms, Jack Dunigan and Abe Conklin have all left for greener pastures.

The other experiment Jacobson is trying, is to imitate the Harry Rich - Ind Specialties. Phil Miller is going to handle this but does not seem very enthusiastic about it. I personally do not feel they will be successful at this, because they're really not equipt, as Harry Rich is to handle the operation.

Once Jacobson does consolidate their office in Elizabeth there is a possibility of recovery. But at this time they are still in the state of flux and confusion. In making this transition they have apparently taken the only avenue available to them. Bad business deals and too many bid jobs have forced them into this decision.

TERRITORIAL ANALYSIS (continued)

January 1975

Saddle Brook Territory

I am beginning to notice that Harry Rich Affiliates has been relying more and more upon the profitability of ISD. They have continued in the recent months to lose jobs when confronted with competitive bidding from Sloan Acoustics. Henry Greenstein's attitude is that Sloan can have the jobs if they bid that "ridiculously". He appears to be content to push material out of ISD with the overhead that Henry has, he has great difficulty in remaining competitive with a leaner organization like Sloan Acoustics.

Sloan Acoustics has replaced Harry Rich Affiliates and Jacobson as the number one acoustical contractor in New Jersey. It will be a challenge to write much of the business with Sloan, being that Celotex has made a significant effort to buy the business from Sloan, with freight deals and selling off list.

The greatest change with A & M is their active promotion of Soundsoak. They have come to realize that this is a money making item for them.

Exhibit E Annexed to Affidavit of Richard C. Wil-

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Spring 1975 Memorandum by Paul R. Langan Entitled "Long and Short Range Plan New Jersey"

P. R. Langan
Long and Short Range Plan
New Jersey

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My three year plan for increasing my business 50%, will be based upon some key words. The year 1976 should be a year for promotion and exposure. It is this year that I feel construction will start to come back in New Jersey. Because of this, I think that it is essential to concentrate on the educational side of selling, make everyone familiar with Armstrong products, not just Armstrong.

There's no doubt that 1977 will be the year that New Jersey begins to ship the volume and dollars again, but I'm also looking forward to a strong expansion in the market. But not expansion for the simple sake of expansion, profitable growth might seem more appropriate. Growth into yet untapped areas, or redirection of energies toward more productive areas, or even the addition of salesmen to cover more extensively certain counties.

The hope is that a close working relationship with contractors and a careful record of their activities will help the contractors perform in the marketplace with the greatest efficiency.

Any plan to increase must revolve around an efficient means of distribution. Our distribution system is committed to the contractor at this point. Whether or not we will enter wholesaling is a question I can't answer at this time. If we do enter a wholesale means of distribution, I would suggest that Harry Rich Affiliates be designated our New Jersey wholesaler. At this time, they are best equipped to handle the line most efficiently.

However, I can't develop a plan for the next three years based on an assumption that Lancaster will make a policy change. My plan is based on contractor distribution. I do not feel that to increase business we must increase contractors. We don't have to sell every contractor on the marketplace. But, we must get and strive for, good committment from the one's I sell.

First of all, I want to start out with the proper contractors. There should be no need in duplicating coverage or function. I think that four contractors will be sufficient, but I want to delete any possible non-performers. I will, therefore, suggest that Jacobson & Co. be dropped by Armstrong. These people are very confused in regards to the future of their business in New Jersey. I think that they're attempting to move in too many directions at the same time. A dry wall business, a wholesaling business, a bid oriented firm and so on. What they were to be strong in the past, as far as an active promotional firm with the ability to close a job, they no longer are. They have no contractor salesmen in New Jersey; where they once had many,(in Southern Jersey) where they once were a active firm, they play little or no role in the market. With all of these new products to promote, one thing I don't need is another bid firm, one that has trouble closing jobs. When we fulfill our committments on our present jobs, our relationship should be terminated.

To take their place, I intend to add a contractor that would concentrate on the Southern and Middle portions of New Jersey. This is the area I perceive the greatest construction growth in the State. I believe it is beginning to move from the Newark area and the very populated Northern areas of the State. The construction of the interstate highway system I287, I80, I78, and N.J. Turnpike make easy access to Southern and Western parts of the State.

The new contractor in the State, Claremont Acoustics should help in developing these areas, not only in physical job by job coverage, but also on the promotional end. What is sorely needed in this area, is a selling force, not a single Armstrong salesman. The addition of this contractor with 6 salesmen should help develop such a force.

This addition is a major part of my plan. First off, we are getting in on the ground floor with an acoustical contractor that is relatively new to acoustics, and we can get 100% committment from them. Secondly, they are also dry-wall contractors, making not only the combination bid of value, but also the fact that many areas that have little in acoustics are large in dry-wall. This will give us some added coverage in an area that we haven't had before (a possible opportunity for more of our specialty items, Second-look, Boldface, Grandshire, Designer Series?). Lastly, these people have maintenance contracts with large firms in Jersey. They are already involved with the renovation decision-makers. We've already got our foot in the door of the renovation market.

Now the problem will be educating this new firm to make the opportunity pay-off. It will take, on my part, a great deal of time and effort to orient this contractor not toward closing the jobs but helping sell our product and his. I intend to hold educational meetings on a monthly basis to introduce and continually review and update our product line. These meetings are not only to review products but also to target jobs, follow progress and discuss achievements. I wish to create a selling force. Salesmen are definitely the key to promotion.

My intentions are to direct this firm toward Monmouth, Ocean, Warren, Mercer and other Southern counties. It is here that Armstrong is the weakest. But, it is also here that competition with larger firms is not as strong. This is where they should be able to establish themselves. I do not expect miracles the first year, but I do expect, with their present backlog, the switch from Jacobson to Claremont should mean a 5% - 10% rise in what I would have done with Jacobson.

The re-orientation of the sales force at Harry Rich Affiliates will be my next task. I don't believe that this is a lot cause. The thing that must be kept in mind, is that while other firms have come and gone over the years, Harry Rich Affiliates has consistently produced volume and dollars.

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Part of my plan, is to travel on a regular basis with the established sales force. This effort would be directed not only at the architectural level, but also at owners, and General Contractors. My goal is to travel with a salesman once every month. In this we can make contacts and leads together. It will not only enhance a working relationship, but also help me to instill the benefits of talking Designer Series, Soundsoak, Boldface, Second-look, etc. with people.

The other approach is to add incentives and competition to selling our new products. One approach I intend to take, is to hold competition, to see who can successfully sell or close jobs (in terms of dollars) with our new products. It would be run on a quarterly basis, the prize being a basket of cheer, tickets to a show or something similar. It's at least an idea that may change the status quo and add that little extra incentive to perform. They have nothing to lose by it.

Harry Rich Affiliates is also participating in our renovation program. At this point, they not only have the sales force to run with it, but also the established customer firms and contacts. The organization is capable of an installation or providing service for simple re-sale. In this case, renovation work may be the key for stocking the Designer Series, or Soundsoak. When this renovation promotion does pay off, we will see it not only in terms of direct sales but also in stocking and merchandising. By the end of 1976, I can foresee Harry Rich Affiliates keeping a healthy stock of all our new products. This alone can easily account for a $100,000 increase for 1976 over 1975.

But throughout 1976 I am going to keep on top of the stock situation. For every two carloads of Travertone or Minaboard, I'll be expecting to see one carload of new products. The way to do this is to maintain direct - mailings and open-house functions and to continue promoting. After all, it's dollars for the contractor.

My promotional plans with A & M Contracting will be designed toward moving Soundsoak wall panels. They have become very efficient at installing them and don't mind taking a slim mark-up once in a while. We are going to approach the promotion in two ways. One, we are embarking upon a direct mailing campaign. We are using standard Soundsoak literature, plus our architectural ad reprints with a letter giving outline information on uses and benefits leaving the opportunity open for sample and swatch request. Soon after, we're going to start a selling blitz, directed at the same industrial and office parks we've already mailed to.

It's an idea for making a direct sale. The other aspect is that we're concentrating on an area potentially more interested in the product. (IBM, Burroughs, Xerox, Victaulic Schering Corp., all firms with computer areas, found within the office parks) and also in a more concentrated area.

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In a time when new construction is on the decline, Soundsoak sales are a good way of continuing to maintain strong sales volume. It's a product you can see immediate results from., for it is not tied that tightly to new construction.

For a firm such as A & M Contracting, it is a means of increasing sales volume without having to geographically expand the territory they would prefer concentrating on. It is also an opportunity for me to get right before the individual that makes the decision and by material I can get the order right from him.

My last contractor, Sloan Acoustics, is a firm that almost purely bid oriented. With only two or three salesmen covering all of New Jersey, they can't (in their estimation) take the time to reach and promote with their customers and architects. But, I believe that with the mark the way it is now, at least one of my contractors must be purely bid oriented. I must have one contractor I can usually count on to out and low-ball a shopping center or speculative office building. I must at this time keep that area of my market well covered so that the low overhead small acoustical contractor doesn't take what small work there is around.

I do believe however that it is time we begin making price concessions to these people. Looking over the off-list sales so far this year, I believe that working with Harry Rich has been something of a mistake in terms of future considerations. This possible move downward in this instance, would merely bring us closer in line with our competitors in this area. But in terms of increased business, I believe we would see a substantial increase for the coming year and the ones to follow. If we intend to move off-list to meet the competition, let's do it on a more consistent basis with the customer we expect to see growing in the contracting business.

There are other certain things that must be done in order to look for and justify expansion in 1977. Growth in terms of contractor effort will take some convincing. But in order to be assured of real growth over the next three years, I must insure that every job bidding is covered and not just bid for the sake of throwing a number in. I intend to establish a monthly bid list which will be circulated to the sales force in each office stating the target jobs to be bid. Then, not only follow up on the jobs, but issure a monthly report. A report on what jobs have bid, what jobs the particular firm bid, and what they followed up on and closed. The idea is to show how much work each firm does after what percentage of the work they close, where and what type of work. Then, sit down each month and look at the statistics. There of course be a time- lag, but this might help illustrate to each of where their efforts are most fruitful. It may also be possible to point the additional volume they could gain by greater concentration on different areas or job types. By 1977 this will help me to point out with each of them strengths, weaknesses, and how they may benefit by an additional salesman somewhere, or change their emphasis on a particular territory. Before setting budgets for that year, I will hold meetings with each customer in an effort to influence their planning for the coming [illegible]

In keeping with the theme of expansion for 1977, I plan on making a case for the inclusion of at least Mercer County, and possibly Burlington County (depending upon how strong an influence my contractors develop there) into my territory. For the New York office, this would not simply mean the rearrangement of territorial responsibility. It would be an actual growth in dollar volume that the Philadelphia office is currently responsible for.

At this point, I do not believe that Armstrong has as strong an influence there as it would like. I am convinced that the development of Claremont Dry Wall and Ceilings as an Armstrong contractor will be a major factor in attaining this goal. This contractor is geographically located very near Mercer County, and already covers that area with consistency. It will be very difficult to me, if I can prove my contractors are getting the bulk of the work in this area. I'll not only have a reason to ask for this area to be included in my territory, but the right to demand its inclusion.

I believe that Trenton and Princeton are the key cities in this area. I intend to insure that my contractors are giving us good promotional efforts in both cities, both on the owner, General Contractor level, and Architectural level. If I can show this the move becomes merely logical.

It is fact that a good number of architects in Princeton and Trenton, do a substantial portion of their portion of their work in my territory. My objective is going to be to make both my customers' and my presence felt on these jobs. I have in the past, found that I too often have little control over what is specified on these particular jobs. I intend to change that in the coming year.

Promotion on the architectural side of the business is another area I intend to concentrate on . It is of course, the most important thing, to see the large firms with the bulk of the work. Seeing an architect on a specific job is usually the best way of getting his attention to what your saying or promoting. This is to me the most efficient way of spending my time.

But on the other hand, many of the smaller architects with smaller size jobs, are interested in new products and information. I don't want to spend all of my time seeing these people, but I do want to keep in touch with them, and keep them up to date on our products. The way I'm going to approach this is by my own direct mailing campaign, that would be on more of a personal basis, rather that a corporate one. The number of items that we have to sell, lends itself to this type of idea.

The mailings would involve a couple of things. It would include the standard literature piece, one of our ad-reprints, a form letter on the product, its uses and benefits, and of course, my card in case he wished to contact me for further information on this or anything else. Each month information on a different product could be mailed out. Armashield, Armatuff, Bolface, Designer Series, Luminaire, Second-look, Soundsoak, or whatever else. I feel that this is a good method of keeping personal contact with many firms, without having to make a good deal of time for personal visits. I don't expect the leads to com pouring in, but I am confident of getting a good response on many items.

Even in large architectural firms the problem of reaching everyone stil remains. I plan on targeting some large architectural firms as those I want to hold promotional meetings for, at least once each year. Those firms included would be the Grad Partnership, Newark; Harsen and Johns, Tenafly; Eckert and Catarz, South Brunswick; Phillips - Kaufmann, Morristown; and Oniplan, Princeton. These will be luncheon meetings, either box lunch at the architect's office, or possibly at the Saddle Brook office. I hope to make it a process of formal invitations, rather than merely setting up a date and asking people to attend. The goal would be initially to familiarize all involved with the many diverse products we have to offer. I will shoot for January 1976 as a target date to initiate these meetings. After the first promotion, I would expect to get at least one more meeting with each firm.

In regards to actual dollar volume, one solution to increasing the total volume, is to increase the value of what I sell. Luminaire jobs will give me the increased dollar per square foot. My thinking is to build consistent volume of C60/30 Luminaire for schools. I've got to reach the right person on this, and it is not necessarily the the architect. I believe that it is the individual school board. In New Jersey, the lighting requirements for schools are very lenient. The only objective is to maintain fifty footcandles. I think the benifits of C60/30 should be brought to the attention of many school boards. There appears to be a good possibility of creating the desir for the system.

Part of my plan will be the education of the school board planners to the benifits of C60/30. I think theres a story to tell as far as glare reduction and lighting effectiveness. I intend to begin a series of lighting and Luminaire seminars. These meetings would be directed specifically at school boards and, architects that do the bul of the school work in the state. The idea is to have them co-sponsor with a contractor (there-by dividing the costs) and developing one particular growth region to experiment with, gauging response and eff ectiveness. If the effort were to pay off with some bona-fide response and interest, I will continue the program in different ar as of the state. If there is no response, I will take my case before each individual board on a job by job basis. But this, in my opinio has become the starting point.

Much of the promotional ideas I've already mentioned concern a planning, bidding, and closing process. However, we do have some products that lend themselves more to stright sale remodeling. I am speaking specifically about Soundsoak. I've also spoken about an idea to move Soundsoak panels with A & M Contracting. But I think I've come up with an idea to move screens (I may not have come up with the idea but have found the opportunity). My promotion and distribution efforts will no longer be merely contingent upon the acoustical contractor. It is obvious by now that the means of distribution for Soundsoak screens is more than inadequate. In most of my sales they have either been stumbled upon by the contractor, or given to him by me. Very rarely have I seen them promote and close a sale with screens. The problem lies in effectively reaching the right person. In screen sales the right person won't normally go to a contractor. In most cases owners would go to office furniture stores, where I've found the cost of our screens not extremely competitive. Yet, many times the owner is looking to totally renovate, but simply remodel his office space. By the time the owner is in contact with the contractor, his space has been redesigned. The owner must be directed toward our screens when he is first looking to remodel. It is then that the idea for the screens and panels can be shaped. This is where interior decorators and designers come into the picture.

In my territory, I've found some firms that design, supply, and install interior furnishings; drapery, carpeting, flooring, wallpaper, etc. I am at the moment attempting to finalize an arrangement by which an interior designer working with such a firm, is furnishing some screens and interior finishes to a company. It is a bid ad., a type of open bid procedure. When and if this is successfully completed, we intend to continue the arrangement buys screens and panels to promote and display. I am securing an agreement with one of my contractors, probably Harry Rich Affiliates, to work with a modest 10% mark-up for direct shipment, and 15% when it must be handled. By the end of six months, I expect the sale of at least 75 screens. I am confident that this is the opportunity to open the market for consistent orders. It is a much better outlet for the screens. Contractors oriented towards new construction are not really capable of providing consistent volume. The interior designer also has the opportunity to make some money for they can then become the single source of supply. Here is an opportunity for an outlet outside the construction business for people not only looking for complete renovations, but maybe just new office furnishings. If this arrangement begins to pay-off, I will begin setting up small outlets such as this using the same criteria. This one happens to be in Union, the ones to follow next year will probably be located in southern Jersey and the other in Bergen County. The idea is to keep this with small firms, not ones where our screens may not be as competitive.

These ideas are intended to be the basics of my plan over the next three years. The forecast for 1975 seems more than bleak, its beginning to appear disasterous for the second half. The construction projects are just not there. I foresee the first half of 1976 much the same way. If I can project into next year looking at what's on the drafting boards this year, I can't see very much happening.

1977 is the year that I see my promotional efforts paying off. I look to that year as one in which I will concentrate on insuring better market penetration on the part of my contractors. I'm confident that the issuing of monthly reports to each contractor will play an important role in this . At least this will help in deciding what direction or course of action to take.

I believe that by 1977, Sloan Acoustics will be by far the dominant contractor in the market. I want to concentrate my efforts far more with them, than any other contractor. These will be the people getting the work over th next few years, and I believe that if we are going to play ball on prices it should be with these people, even if it takes abetter extention of credit in the beginning.

By 1977 or '78 two distinct courses should develop for us to take. One route is the wholesale route, the other to remain committed to the contractor. Either way we go Harry Rich Affiliates will play the major role. At this point in time they seem to be specializing in certain renovation and re-sale accounts. Their contracting business appearsto be slowly deteriorating. In 1977, when many new construction projects will be bidding, I don't see Harry Rich Affiliates as being very competitive on closing jobs. In order to do so they would have to make some very major changes in the structure of their organization. They appear to be placing a growing emphasis on their wholesaling operation, which very definitly payed off for them. At by 1978 we will have to make some decision as to where we stand with them, wholesaler, or contractor.

By 1977, we should have a direction in mind. If the answer is wholesaling, we will then be able to reach the small contractors we've never reached before. We can open our line up to everyone. The question becomes what do we have to gain by no longer restricting ourselves? If the tendency I've begin to see emerge, continues, manufactures on the wholesale level will be shopped against one another for the best deal or bargain on their commodity items. We may no longer be competing on price list levels, but on functional discount levels.

Regardless of which route we decide to take, these changes are going to develop. If we do not go into wholesaling with Harry Rich, our relation with them will deteriorate. I therefore suggest that we continue to push for a stronger relationship with Sloan Acoustics, making them our target firm. I intend to maintain rebationships with three smaller firms, to conentrate on specific areas, promoting and closing smaller work.

If on the other hand, the wholesaling route develops into the path to greater volume, I see no need to abandon my efforts towards solidifying relationships Sloan, A & M, and Claremont. The only difference being the fact that HarryRich would have to develop accounts and business to the point that they could offset the projected loss of business to the other three customers.

The road to a volume increase of 50% by 1978, will have to take one path or the other.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JACOBSON & COMPANY, INC.,

Plaintiff,

-against-

ARMSTRONG CORK COMPANY,

Defendant.

76 Civ. No. 2376 (EW)

AFFIDAVIT

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES M. GOODWILLIE, being duly sworn, deposes and says:

1. I am New York Regional Manager, Residential Ceiling Sales Division, for defendant Armstrong Cork Company ("Armstrong"). I have been employed by Armstrong for 30 years and from 1955 to 1971 I was District Manager of the New York District Office, Building Products Division, for Armstrong. I submit this affidavit in opposition to the motion of plaintiff Jacobson & Company, Inc. for a preliminary injunction.

2. In March of 1968, Jacobson was appointed as a contractor-distributor of Armstrong ceiling products in the Northern New Jersey-New York area, at which time I was manager of that area.

3. The reason we granted Jacobson a distributorship at that time in those areas was our desire to have aggressive promotion of our ceiling products and our belief that Jacobson would provide this type of representation of the Armstrong ceilings line. Jacobson in 1968 was generally known to be an aggressive selling and promotional operation and had a large commissioned sales force.

4. Annexed hereto as Exhibits A and B, respectively, is a letter from Martin Brennan of the Jacobson organization to me, and my response to Mr. Brennan, in regard to Jacobson being initially set up as an Armstrong ceilings contractor-distributor in the Northern New Jersey-New York areas. Mr. Brennan, in his letter, insisted that Jacobson be the sole Armstrong ceilings contractor on Long Island and in Westchester-Rockland-Fairfield Counties and our second distributor in the five boroughs of New York City and Northern New Jersey (Exhibit A). I acceded to the Long Island request, provided that Armstrong be Jacobson's "sole major supplier on Long Island," which meant not that Jacobson refrain from buying competitive ceilings products (which we did not require of any contractor-distributor in my area), but that since Jacobson was to be our sole Long Island contractor-distributor, Armstrong expected Jacobson to aggressively represent Armstrong on Long Island (Exhibit [illegible] And, in fact, Jacobson continued to sell both Armstrong and competitive ceilings lines on Long Island after its contractor-distributor appointment.

5. No fixed term arrangement was desired by Armstrong for Jacobson's contractor-distributorship, and it was the parties' understanding that the arrangement was terminable at will by either one of us.

6. As you will note in Mr. Brennan's letter to me dated March 4, 1968 (Exhibit A), he also mentioned that Jacobson would like to be appointed as a ceilings contractor-distributor in the Philadelphia area, but he recognized that this was out of my jurisdiction and that he would have to talk to someone else in our company who had jurisdiction over both areas in this regard. My March 28, 1968 response to Mr. Brennan (Exhibit B) reflects the

fact that, subsequent to the Brennan letter, Mr. Brennan and I discussed this matter with Mr. James O. Sampson, General Sales Manager of the Building Products Division, and Mr. Sampson ultimately indicated to Jacobson that because Armstrong felt its representation in Philadelphia was excellent, a contractor-distributorship in Philadelphia was then unavailable, but that the decision could be reconsidered in the future.

7. Thereafter, on occasion, between 1968 and my departure from the office in 1971, Jacobson would renew its request to me that it receive an appointment as an Armstrong ceilings contractor-distributor in the Philadelphia area. Each time mention was made of this, I reiterated that I had no authority regarding Philadelphia and told Jacobson that it should direct its requests to J. E. Snyder, manager of the Division's Philadelphia Regional Office.

8. Although Jacobson never received a ceilings contractor-distributorship in the Philadelphia area during my tenure as New York area manager, my office never put any constraints upon it with respect to competing in the Philadelphia area or for that matter bidding and selling in any area outside the New York-New Jersey area.

9. However, prior to mid-1970, I cannot recall Jacobson ever shipping Armstrong ceiling products into Philadelphia, or indicating any desire to do so.

James M. Goodwillie

JAMES M. GOODWILLIE

Sworn to before me this
9th day of June, 1976.

Elizabeth A. Bergbuchler

ELIZABETH A. BERGBUCHLER
Notary Public, State of New York
No. 24-4519888
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Exhibit A Annexed to Affidavit of James M. Goodwillie

Letter to James M. Goodwillie from Martin J. Brennan, Dated March 4, 1968

JACOBSON
& Company, Inc.,
Contractors
since 1889.
104 E. 25 Street,
New York, N.Y.
10010
Area 212,
677-4250.

451 a

March 4, 1968

PERSONAL & CONFIDENTIAL

Mr. J. M. Goodwillie, District Manager
Armstrong Cork Co., Inc.
60 West 49th Street
New York, New York

Dear Mr. Goodwillie:

At our last meeting I informed you that we would give careful consideration to the question of what areas would be involved should we decide to represent a major manufacturer other than, or in addition to, our present supplier or suppliers. You indicated that you would then consider our conclusions as they affect your own plans and let us know what is possible from your viewpoint.

One matter that we both gave little attention to in our considerations thus far is the fact that our Philadelphia office represents a major unit of our company and cannot be isolated from the broad subject. We believe that since you indicated that, as manager of your company's New York area, your jurisdiction does not include the areas covered by our Philadelphia office (eastern Pennsylvania, southern New Jersey and northern Delaware) that one of your regional officers who has jurisdiction over the entire area under discussion be brought in at this time for our further mutual explorations.

Long Island Area - Nassau and Suffolk Counties

In this area we would want to be the sole distributor in this assigned territory. After careful consideration it is our firm belief that we can out-purchase your present sole distributor on all products across the board. Our extensive business in the school, hospital, office and shopping center markets would insure a good volume of competitive type products. We are also certain that with our skilled sales staff in that area plus the work of our Environmental Control Systems Department we could do an outstanding job on specification items, including, but not limited to, Luminaire, Ceramaguard, etc. Our conclusion is that dual distribution would inhibit our ability to build up specification work and the area is too small to have two agressive distributors fighting each other for the order for the same product.

Westchester - Rockland - Fairfield Counties and
Five Counties of New York City

In these areas we would want to be the sole distributor in the assigned territory of Westchester, Rockland and Fairfield Counties and the dual distributor in the assigned territory of the five

counties comprising New York City. Because this is all the territory that has been handled for thirty-six years as that of our New York office, it is not feasible to handle either of these two areas without the other.

There is no question in our minds that we can produce more business in the three counties north of the City than your previous distributors. Moreover, we have recently been enjoying great success in producing specification work in all of these counties and know that we can do an outstanding job on your line there.

In New York City, as outlined to you, we have salesmen in Queens, Brooklyn and Staten Island, Bronx and three Manhattan. This staff of six men is augmented by our ECS Department consisting of a manager (who sells), three sales engineers and an inside staff man. There is a lot of area and business in New York City and we question if any one company can really cover the city. It is for this reason that we think that dual distribution is acceptable from our viewpoint and desirable from yours. We do not seek sub-standard markup business and at times this means that we may not be active in the speculative office building market, city schools and certain types of city, state and federal work. We have, however, proved that we can compete with anyone when conditions are favorable as was the case in the Chase Manhattan Building, numerous packages for Diesel Construction, Uris Brothers, William Kaufman and others, plus the General Motors Building, etc.

We would naturally prefer that your specification items, particularly Luminaire, would be available only to us in the same way that U.S.G. and O.C.F. in areas where they have multiple distribution still limit proprietary items, such as Airson and Dimensionaire, to one distributor. However, we understand that up until now at least, it has been your policy to put all of your acoustical products and systems through all of your distributors. We can go along with this policy if need be even though we cannot put the same amount of manpower and promotion on these specification items as we could afford to do if we had sole distribution. We could still develop a respectable volume of business in this area because we have the contacts in architects and mechanical engineering firms that we have developed over a twelve year period of actively promoting and selling radiant - acoustical ceilings.

Northern New Jersey (from Mercer and Ocean Counties north)

Our northern New Jersey operation based in Elizabeth, New Jersey has always been one of our strongest areas. Since opening this office in 1941, we have enjoyed a very stable situation in both sales and construction staff. Continuity has paid off for us. At present we have six acoustical salesmen and one partition salesman in addition to the branch manager. Additionally, this office (as does Plainview and New York) has a call on our ECS Department sales staff. Our chief construction superintendent was with us when we opened the office twenty-seven years ago and is still going strong. Today he has two assistant superintendents under him. This office bills in excess of three million dollars worth of ceiling work annually.

As explained to you, in September, 1967 we gave up our New York warehouse in Long Island City and by expanding, modernizing and mechanizing our warehouse buildings on our own property in Elizabeth, created a consolidated New York - New Jersey warehouse. By this

consolidation we improved our efficiency in trucking and handling of materials, enjoy a better labor situation and will give both New York and New Jersey the benefit of a more complete inventory. Our competitive position has been strengthened by this move.

However, from the standpoint of our present discussion, this warehouse consolidation makes it a virtual impossibility to have other than a common major supplier of materials for both offices. We believe that dual distribution in this area is the minimum situation that would possibly be mutually acceptable.

We can discuss Plainview by itself, but beyond this we have the situation that it is awkward to think in terms of Westchester-Rockland-Fairfield without New York City and it is uneconomic for us to think of New York City without northern New Jersey. However, there are positive gains in these suggested plans as far as your company is concerned because our company's purchases of acoustical materials is in the low seven figure bracket and we discount our bills. I assume you have a D & B report on us which shows that for many years now we have enjoyed an AaA 1 rating.

When you have had an opportunity to consider the above, including our request that the Philadelphia area be made a part of this discussion, please let us know when we can get together to pursue the matter further.

Sincerely,

Martin J. Brennan
President

MJB:mo

CC: Mr. John D. Jacobson
Mr. Thomas F. Head

Exhibit B Annexed to Affidavit of James M. Goodwillie

Letter to Martin J. Brennan from James M. Goodwillie,
Dated March 28, 1968

March 28, 1968

Mr. Martin J. Brennan
Jacobson & Company, Inc.
104 East 25 Street
New York, New York (10010)

CONFIDENTIAL

Dear Mr. Brennan:

On March 4, 1968 you wrote us proposing an alliance between your Company and Armstrong involving your several operations. As you know, we have had several meetings since that time to discuss various aspects of that proposal. In addition, we have thoroughly reassessed our position in light of your requests.

Long Island Area - Nassau and Suffolk Counties

In this area we would agree to your being our sole distributor, assuming a mutually exclusive arrangement. We would expect to be your sole major supplier in this area, an arrangement similar to our current exclusive situation.

Westchester - Fairfield Counties and
Five Counties of New York City

In these areas we would agree to dual distribution. We could not exclude our present representation in either Westchester or Fairfield County. We would have no justification for an exclusive arrangement since none of the three contractors involved are actually based in either of these counties. While we would not expect to be an exclusive supplier, we would expect to replace product lines where we could supply equal or superior products.

BEST COPY AVAILABLE

Northern New Jersey - Rockland County

With reference to your Elizabeth operation, we would agree to dir distribution and we include Rockland County since you consider it part of this operation. Our area of jurisdiction coincides with yours except for that portion of Mercer County serviced by your Elizabeth office. Since you service the major metropolitan area of that county (Trenton) from your Philadelphia office, there should no basic conflict. Again, we would expect the same consideration with respect to other suppliers as in the case of New York City.

With respect to the Philadelphia area, we can only refer you to Mr. Sampson's remarks during our recent meeting. The unavailabili of the territory at the moment does not close the door to possible consideration at some time in the future. We would, however, expe complete respect of our Philadelphia office's current position on the matter.

We envision one problem with respect to your joint New York - New Jersey warehousing facility at Elizabeth. This warehouse services areas assigned as the responsibility of four different Armstrong salesmen: New York City, New Jersey, Westchester-Rockland and Fairfield. Since sales credit is of significant importance to these men, and to our Company in evaluating their performance, we would ask that a system be devised to enable you to give us a breakdown of your warehouse shipments to these areas. Direct shipments would pose no problem, but it would be important to us to get an accurate breakdown on materials shipped by us to your Elizabeth warehouse.

If we can agree on the areas and proposals out-lined above, we believe we are in a position to discuss positive and immediate act We would appreciate hearing from you further at your earliest convenience and would hope to conclude negotiations prior to your departure on your extended trip.

Very truly yours,

J.M. Goodvillie
District Manager

PAT

J.O. Sampson, Building Products Division, Lancaster
J.K. Rankin, Building Products Division, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACOBSON & COMPANY, INC.,

Plaintiff,

-against-

ARMSTRONG CORK COMPANY,

Defendant.

REPLY AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

76 Civ. 2376 (EW)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN D. JACOBSON, being duly sworn, deposes and says:

1. I am the President of plaintiff, Jacobson & Company, Inc. ("Jacobson"), and I make this affidavit in reply to the affidavits of Phillip W. Unger, Richard C. Wiley, Jacob Snyder and James M. Goodwillie which were submitted in opposition to plaintiff's motion for preliminary injunctive relief.

2. This affidavit will be divided into three sections. First, I will reply to defendant's assertions concerning the reasons why Jacobson was terminated. Second, I will address myself to the defendant's efforts to distort the documented facts, already in the record, concerning defendant's efforts to prevent Jacobson from competing with other Armstrong distributors outside Jacobson's assigned territory. Third, I will discuss defendant's allegations that Jacobson will not suffer irreparable injury if it is denied access to Armstrong products.

The blatant distortions in defendant's affidavits regarding the termination of plaintiff's distributorship

3. The affidavits of Richard C. Wiley and Phillip

W. Unger attempt to portray plaintiff as a rapidly declining organization, reduced to what Wiley refers to as a "skeletal" operation. (Unger Aff. para. 21). Plaintiff's "Supplemental Memorandum" sets forth evidence from defendant's own sales records which conclusively destroys defendant's efforts to belittle plaintiff's performance. These records reveal that notwithstanding some decline (like the general decline in the construction industry, especially in the metropolitan New York area), plaintiff continues to be one of defendant's leading distributors in the volume of its purchases from defendant. In 1973 and 1974, plaintiff ranked second and in 1975 it ranked third, among fifteen authorized Armstrong distributors in the Northeast region.

4. Significantly, defendant's affidavits make no reference at all to the sales records which were produced at their depositions. Indeed, defendant's affidavits make very little reference to other distributors and to how Jacobson compares to them in terms of its recent purchases from Armstrong. Defendant apparently would prefer to have this Court view Jacobson's recent purchase figures in a total vacuum.

5. The only reference at all in defendant's affidavits to plaintiff's competitors is found in paragraph 21 of the Unger affidavit, where it is alleged that Jacobson's "decline in ceiling purchases during the 1974-1975 period are the sharpest of any of Armstrong's major contractor-distributors in the New York area", and where reference is made to increased sales of two of plaintiff's competitors. In fact, of the eleven distributors in the Northeast for which defendant's 1974 and 1975 records were available, eight experienced a decline. Moreover, analysis of their records shows that the statement by

Unger that Jacobson experienced the "sharpest decline" is a complete fabrication. For example, Harry Rich's purchases in 1974 totalled $636,066, but declined in 1975 to $434,803, a drop of 32%. Similarly, Island Acoustics' purchases declined from $246,332 in 1974 to $136,388 in 1975, a decline of over 44%. By contrast, the decline in plaintiff's purchases from 1974 to 1975 was only 25%. (See Plaintiff's Supplemental Memorandum, Exhibit A).

6. Far more importantly, in 1975 plaintiff's total purchases from defendant exceeded those of many of defendant's other distributors, both in this region and throughout the United States. Indeed, as pointed out in plaintiff's Supplemental Memorandum, in 1975 the average Armstrong distributor in the United States had purchases from Armstrong of less than $185,000, and the average distributor in this area accounted for about $300,000 in such purchases. Thus, in 1975 Jacobson's purchases were more than twice those of the average distributor in its region, and more than three times those of the average distributor across the country. The fact that plaintiff's purchases declined in 1975 simply means that its purchases were particularly high in 1974, not that they were low in 1975.

7. Unger's affidavit also distorts the facts concerning Jacobson's list of outstanding commitments for Armstrong materials to be purchased by Jacobson from Armstrong during 1976. Unger concedes that more than $500,000 worth of Armstrong materials is involved. He argues, however, that this amount does not truly reflect actual future purchases by Jacobson from Armstrong, since some of these orders may be reduced slightly and, he says, Jacobson may not be bound by some of the orders. This feeble effort by Unger to diminish the volume of Armstrong products already ordered by Jacobson, is negated by the simple

fact that when Jacobson was terminated on March 19th, it had already given Armstrong firm orders of more than half a million dollars worth of Armstrong products for jobs already secured by Jacobson which definitely will require Armstrong products. There is nothing speculative or remote about those orders. They are actual and present. Moreover, if Jacobson had not been terminated, still additional orders would have been placed during 1976 with Armstrong. In short, if the termination had not occurred, Jacobson would have continued to rank among the top distributors in this area in terms of the volume of its purchases from Armstrong.

8. The affidavits submitted by Armstrong make no reference to the overall performance of Armstrong's other distributors, because that would clearly reveal the falsity of defendant's representation that Jacobson was terminated because its purchases had declined. It is also significant that defendant's affidavits make no reference to the circumstances in which other distributors have been terminated in the past. Defendant's officials do not tell the Court that at their depositions they were unable to name a single distributor ever terminated by Armstrong whose purchases were at all substantial. Indeed, Snyder conceded that in 24 years as manager of Armstrong's Philadelphia office, he never terminated a distributor except on a few occasions, where the distributor's purchases were "very negligible". When asked specifically about those few occasions, defendant's officials referred to a few distributors who were cancelled when their purchases were in the area of $12,000 a year, and who were having credit problems with Armstrong. Defendant's sales records also show that Armstrong presently has many small distributors whose purchases on an annual basis are under $100,000. None of these firms has been terminated, and defendant's officials admitted that no thought is being given to

terminating any of them. In short, when plaintiff's record of performance is placed in proper context and compared to that of others, it is obvious that plaintiff was not terminated because of any decline in its purchases.

9. Unger contends that Jacobson was also terminated because of what he calls a "deteriorating relationship between Jacobson and Armstrong", and he attaches to his affidavit memoranda concerning a few disputes between Armstrong and Jacobson, as evidence of this "deteriorating relationship". There is no point in burdening the Court with a detailed discussion of the disputes referred to in Unger's affidavit. When plaintiff's attorneys, Jerome Lasky and Joseph Fishman, met on April 17, 1976 with defendant's in-house counsel to discuss plaintiff's termination, not a word was mentioned about any such disputes, and when Unger and Wiley notified Jacobson that plaintiff was terminated, the only reason given was that Jacobson's sales allegedly had declined. Now, realizing the transparent falsity of that representation, defendant is attempting to shore up its position by dragging in memoranda concerning routine business disputes,

10. Rather than yield to the temptation to debate the merits of the disputes referred to by Unger, which are totally irrelevant here, I would merely like to make the following points to put the matter in proper prospective: First, although Unger asserts that "by the end of 1974, Jacobson's complaints in dollars as a percentage of ceiling sales was running at a rate of six times Armstrong's national average.", he sets forth no documentary evidence to prove this self-serving, vague assertion. On the other hand, records turned over by defendant to plaintiff showing the amount of claim allowances for each customer, and the ratio between those claim allowances and the volume of sales to those customers, shows that the claim allowances

issued to plaintiff were generally of the same magnitude as those issued to many other distributors, none of whom has been terminated. Unger's reference to Jacobson's complaints "running at a rate of six times Armstrong's national average" is therefore a complete mystery, and at odds with defendant's own records.

11. Second. The documents annexed to the Unger affidavit referring to disputes between Jacobson and Armstrong actually relate to only a few jobs, namely, the Newark State College Science Building, the CUNY Academic Center and the Nassau County Community College. Needless to say, these few jobs represent only a small portion of the jobs done during the last few years by Jacobson, for which Armstrong supplied the materials. Although I have not had an opportunity to check our records on this point, I would estimate that in the last three years alone, Jacobson has installed Armstrong products on more than 500 construction projects. Pointing to three or four jobs on which the parties had disputes over Armstrong's performance, pricing and materials, is distorting the complete record.

12. Third. The memoranda submitted by Unger represent, of course, the internal opinions of certain of Armstrong's personnel concerning these disputes. Other officials at Armstrong apparently disagreed with the writers of these memoranda since, in each of the disputes referred to, Armstrong ultimately recognized the validity of Jacobson's claims, and issued credit memoranda authorizing Jacobson to deduct from its accounts payable certain sums owing to Armstrong. For example, although much is made in the Unger affidavit of a dispute between Armstrong and Jacobson concerning the Newark State College job, Unger does not tell the Court that the dispute was resolved in plaintiff's favor.

13. Fourth. What defendant has done is to go through its files on Jacobson, and to cull from literally thousands of documents, stretching back many years, a few internal memoranda in which some of Armstrong's employees have expressed dissatisfaction with Jacobson's insistence on obtaining price adjustments, or other adjustments, where Armstrong has failed to adhere to its contractual obligations to supply Jacobson with materials and services in connection with particular construction jobs. A review of Armstrong's files concerning other distributors (especially those who have been accounted for as many purchases from Armstrong as Jacobson) surely would turn up similar memoranda with respect to them.

14. The important fact is that, according to Armstrong's own witnesses, no distributor has ever been terminated as a result of such minor matters. Moreover, it was not until this lawsuit began that Armstrong took the position that it terminated Jacobson over such disputes. I respectfully submit that this last minute attempt to justify Jacobson's termination is another smoke screen to hide the actual reasons for the termination.

Armstrong's termination of Jacobson to enforce anti-competitive policies.

15. In my initial affidavit, I described how Jacobson was precluded by Armstrong from selling and installing Armstrong products in the Philadelphia area, in competition with Berger Acoustical, Inc. ("Berger"). I mentioned that during the early nineteen seventies Armstrong refused to give Jacobson pricing information on construction jobs in that area and refused to give Jacobson access to Armstrong's office in Philadelphia, whose services

were required if Jacobson were to successfully compete with Berger in that region. I attached to my affidavit letters from Armstrong to Jacobson specifically stating that Armstrong did not want Jacobson to sell its products in that area because of its relationship with Berger, whom Armstrong called its "sole distributor in the Philadelphia market for over 20 years." (See letter dated February 3, 1971 from J. O. Sampson to me, a copy of which is annexed as Exhibit H to my original affidavit). Defendant tries to suggest in its affidavits that although its distributors are assigned what it calls "areas of primary responsibility," it has no objection if the distributors go outside those areas and sell in other territories. In this connection, Unger has submitted a list of six of Armstrong's 300 or more distributors who, he claims, have installed Armstrong products outside of their territories in recent years. Defendant also contends that Jacobson "often bid and sold Armstrong products in the Philadelphia area" (Snyder, Aff. para. 8), that Armstrong's Philadelphia Regional Office never objected to any such sales, and that no "objection (was) conveyed to my office by Berger or any other Philadelphia area contractor-distributor regarding such bids of sales by Jacobson" (Snyder Aff. para. 8). Finally, defendant's affidavits refer to four jobs in the Philadelphia area where Jacobson installed Armstrong products.

16. These allegations cannot be squared with the documented facts. The assertion that Armstrong's Philadelphia Regional Office did not object to Jacobson's competing with Berger is completely refuted by a memorandum from J. O. Sampson to J. H. Snyder, dated July 6, 1970, concerning Jacobson's desire to become an authorized Armstrong dealer in the Philadelphia area and to compete with Berger.

17. The memorandum nowhere mentioned in defendant's papers, thus states:

> "...Jacobson is stocking Armstrong almost 100% at Elizabeth,... Accordingly, whether we like it or not, there will be Armstrong material show (sic) up on Jacobson jobs which are supplied from their Elizabeth, New Jersey, warehouse...
>
> "...I told John that you were extremely reluctant to recognize Jacobson in Philadelphia as an Armstrong contractor. I related the reasons for this which you had given me - that Berger is having a wonderful year with us, that the timing is bad from their standpoint since they have been harassed with labor difficulties...I told him that I would appreciate their not shipping any large jobs direct from our factories, unless or until you are prepared to recognize their Philadelphia branch as a full-fledged Armstrong customer....
>
> "I guess, Jake, that this has finally boiled down to the place where I have to ask you for the overall good of the business to accept Jacobson's branch in Philadelphia. While I know you feel that timing is wrong, and I do recognize that we may end up with lower sales from the Philadelphia market because of this development, the only alternative is to close out Jacobson in New York, and this, I think, would be a bad move from the standpoint of the Company's overall business."

18. This memorandum (a copy of which is annexed hereto as Exhibit A) undercuts defendant's assertion that neither its Philadelphia Office, nor Berger, had any objection to Jacobson's selling Armstrong's products in the Philadelphia area. The fact is that Armstrong did object to Jacobson's doing so, which is why Armstrong refused to make Jacobson an authorized Armstrong dealer in Philadelphia, refused to give Jacobson equivalent prices to those it was giving Berger on jobs in Philadelphia, and resisted all of Jacobson's efforts to have full access to Armstrong's Philadelphia Regional Office.

19. As pointed out in defendant's affidavits, there were, of course, a few occasions when Jacobson was able, over the resistance of Armstrong, to obtain jobs in the Philadelphia region. These jobs are just a few compared to the many jobs which Jacobson was precluded from bidding on

because of Armstrong's refusal to recognize Jacobson as an authorized dealer in Philadelphia, its refusal to give Jacobson pricing on jobs in Philadelphia equivalent to the pricing it was giving Berger, and its threats to terminate Jacobson if Jacobson insisted on competing in the Philadelphia area.

20. As I mentioned in my previous affidavit, it was against this backdrop that in 1975 plaintiff opened up a Supply Center for the sale of ceiling materials directly to consumers, and that Jacobson actively advertised the activities of the Supply Center by sending over 6,000 advertisements to hospitals, schools, acoustical contractors and other potential customers in Pennsylvania, Southern New Jersey and Delaware.

21. Although Snyder says in his affidavit that his office never received any objections from Berger regarding sales by Jacobson in Berger's territory, at his deposition Snyder testified to the contrary. Thus, Snyder admitted at this deposition that in October 1975, Walter Koenig, a sales representative in the Philadelphia office, received from Berger a flyer put out by the Supply Center advertising a sale of Armstrong products at discount prices. Snyder testified that Keonig had been "getting some feedback" from Berger about this sale, and "the special prices at which the materials were to be sold." After discussing the matter with Snyder, Keonig sent the flyer to Unger who, in turn, forwarded it to Wiley, after first adding the following notation:

> "Here is an example of what I mean - we'll hear about this from many of our Philadelphia customers. These people don't give a damn about Armstrong. They never have and never will. I doubt very seriously if the $ we'll get in 76 is really worth the grief."

(A copy of the flyer, with the notations of Koenig and Unger, is Exhibit C to Plaintiff's Supplemental Memorandum).

22. Snyder testified that Berger turned over to Koenig at least one other mailing from the Jacobson Supply Center, and that this mailing was kept by Snyder in his private files. Snyder also testified that Armstrong's Philadelphia Regional office maintains an extremely close relationship with Berger, that Koenig visits the Berger office several times a week, and that Snyder and Koenig are close personal friends of Berger's chief executive, and have been for many years. At the same time, Snyder claimed that he has never discussed Jacobson with Berger, although he admitted that he views Jacobson as a competitor of Berger. Can one seriously believe, that over a period of 8 years, during which time Snyder and Koenig had literally thousands of conversations and contacts with Berger, they never once discussed Jacobson or its activities in Philadelphia?

23. As previously mentioned in plaintiff's papers, in February, 1976 Jacobson wanted to compete for a major and significant construction job in Atlanta, Georgia, in competition with Armstrong's regular distributors in that region. In connection with that job, Jacobson was considering the use of several integrated ceiling systems, including those manufactured by Armstrong. For this reason, on February 17th Sam Schanzer and John Higgins of Jacobson's office met with Don Lopez, assistant manager of Armstrong's New York Regional Office, and indicated Jacobson's desire to bid the Atlanta job. It is conceded by defendant that in response to this request Lopez stated that Armstrong did not want to give Jacobson pricing information because it did not want

Jacobson to compete with its distributors in Atlanta. As Lopez himself stated, in a memorandum to Wiley concerning the Atlanta job:

> "I contacted Dave McNaughton and he said he didn't want to quote them if he didn't have to.
>
> "I contacted Jacobson a couple of days later either Thursday or Friday .. I told John Jacobson that as long as he had asked us if we want to quote or not that we would rather not quote him. We have several local contractors in Atlanta bidding on the project and we feel we have adequate coverage.."
>
> (A copy of Lopez' memorandum is Exhibit D to Plaintiff's Supplemental Memorandum).

24. As Lopez went on to state, when I insisted that he give Jacobson a price for the Atlanta job he responded that he would do so only if Jacobson gave a commitment that it would give Armstrong the order if it got the job, and I refused to give such a commitment. It was only when I refused to accede to this demand that Armstrong finally, and reluctantly, gave Jacobson a price. Three weeks later, of course, Armstrong terminated Jacobson's distributorship.

25. In his affidavit, Unger points to this Atlanta incident as an example of the "deteriorating relationship" between Jacobson and Armstrong, thus conceding that Jacobson's efforts to compete with Armstrong's distributors in the Atlanta region, contrary to Armstrong's territorial policies, was a factor in bringing about Jacobson's termination.

26. Unger criticizes Jacobson for refusing to commit itself to use Armstrong products on the Atlanta job if Armstrong provided Jacobson with a ceilings price quote for the job. At the same time, he admits that Armstrong "fully recognizes that Jacobson is completely within its rights to bid competitive products whenever it wishes.." (Unger Aff. para. 30). Unger fails to mention that the reason Armstrong did not want to quote Jacobson a price was because, as Lopez' memorandum stated, Armstrong did not want Jacobson

competing with defendant's Atlanta distributors.

27. To avoid any misunderstanding, I should also mention that the practice of a distributor obtaining price quotes from several suppliers for a particular construction job is routine and, indeed, necessary. The Atlanta job, for example, involved a Federal office building, whose specifications required the contractor to obtain an unusual configuration of materials woven into one system, and at the lowest price available, to meet performance criteria. Without going to Armstrong for the technical data and pricing it had available, there was no way for Jacobson to determine whether it could competitively bid the job. It would be irresponsible for Jacobson to commit itself to Armstrong without first comparing its system and prices, with those offered by other suppliers.

28. In summary, defendant's own records, and the admission of its officers at their depositions, categorically refutes the contention that Jacobson was terminated because its sales had declined or because of routine disputes with Armstrong over pricing matters, defective merchandise or the like. A comparison of Jacobson's performance with those of other distributors, makes it clear that Jacobson has been a first rate distributor, in the front ranks of the contractors in this area to whom Armstrong supplies its materials and products. The fact that Jacobson, in response to the collapse of the construction industry, prudently cut its overhead and reduced some of its operations, clearly would not cause Armstrong to terminate its distributorship, since Jacobson remained a major customer for Armstrong products.

29. Jacobson actually was terminated because it aggressively pursued its right to compete around the country in the sale and installation of Armstrong products to whom-

ever, and at whatever prices, it chooses. Armstrong simply could not tolerate such an independent attitude by one of its distributors. Berger, the sole Armstrong distributor in the Philadelphia area, objected to Jacobson's competitive activities there. Armstrong apparently feared the reaction of other distributors in the Atlanta area to Jacobson's sales efforts there. To avoid such threats to its distributorship system, on March 19,1976 Armstrong suddenly, and with no prior notice, terminated the distributorship.

Irreparable injury to plaintiff and the balance of hardships.

(a) Irreparable injury to plaintiff.

30. As indicated in my prior affidavit, Jacobson will suffer irreparable damage if it cannot obtain the Armstrong line of products. Paragraph 31 of Unger's affidavit attempts to minimize the effect on Jacobson in a manner which is totally false.

31. Contrary to Unger's statement, Jacobson did not build its ceiling business over a 70 year period on the basis of non-Armstrong products. While Jacobson was formed more than 70 years ago, for many years its business did not relate to ceilings installations at all. More importantly, in recent years Jacobson has come to depend more and more on Armstrong products, and Jacobson's purchases of ceiling materials from other suppliers are miniscule in comparison to its purchases from Armstrong. In 1975, for example, Jacobson's purchases of heavy density acoustical ceiling materials was as follows: Conwed - $38,584.98; Celotex - $59,834.15; Armstrong - $605,758.44

32. Unger is also wrong when he alleges that Jacobson's sales from other aspects of its business (e.g. partitions) is larger in dollar volume than its sales of ceiling products. In fact, about 80% of plaintiff's business in the last five years has involved ceilings, and it is virtually impossible to compete in this area without

access to defendant's product line, since every major metropolitan New York contractor can get this line. Like its competitors, the reason plaintiff needs the Armstrong line so badly is that Armstrong's proprietary products and multiple combinations are unique in the industry.

33. There is no question that certain highly desirable Armstrong products are unique and unavailable elsewhere. For example, Armstrong's antique glass tile, solid leaf, registry, corkstyle, soundsoak, san serra, highspire, brandshire, and its ATS suspension system are all proprietary products which have not been duplicated. Further, Armstrong is able to maintain its dominant position in the ceiling industry by its exceptional research and development forces. It is common knowledge that Armstrong generally develops new products and its competitors follow with an acceptable substitute one or two years later. Thus, Armstrong enjoyed no competition for its fire rated materials, luminaire, symmetry, and ceramic tile systems until several years after their development had passed.

34. Since Armstrong presently has certain products which are not duplicated, and Armstrong has the largest advertising budget in the ceiling industry, architects frequently specify Armstrong products for jobs. This is especially common because Armstrong frequently combines its products to form multiple product systems which are promoted as entire units to architects. Once such a system is adopted, it is virtually impossible to "break the specs" and substitute other products.

35. An example of the adoption of such a multiple system is the Texaco International Headquarters, referred to in my earlier affidavit. If the bidding had been scheduled to take place after Armstrong terminated its relationship

with Jacobson, there would have been no way Jacobson could have obtained the job, since the architect specified and insisted upon Armstrong proprietary products. Fortunately, the contract was secured by Jacobson at a price of over $800,000.

36. Unger claims that since Jacobson has been concentrating on larger construction jobs, it "should almost never encounter a specification that would insist on an Armstrong ceiling product". (Unger Aff. para. 26). This statement is totally incorrect. As I mentioned before, on private construction jobs architects frequently specify Armstrong products. The Texaco job mentioned above is an example. On government jobs, Armstrong products are also often preferred, whether specified or not. Without the Armstrong line, Jacobson would be the only major contractor in the New York area that could not bid Armstrong products on public jobs. The effect on Jacobson of not being able to bid Armstrong on such jobs would be drastic.

37. Another compelling example of Jacobson's need for Armstrong products is the demand of our Supply Center. As indicated in my earlier affidavit, one of the major purposes of the Supply Center was to fulfill the needs of owners and contractors who wanted to purchase ceiling supplies without going through a distributor. The high percentage of Armstrong products in the Supply Center's sales reflects the demand of the purchasers for Armstrong products. If Jacobson does not receive Armstrong products, it is likely that the Supply Center will be forced to close.

38. It is not disputed that Jacobson, like most of its competitors, has suffered in the past few years due to the decline of the construction industry. Plaintiff acknowledges that it has cut back its staff and locations in an attempt to weather the crisis. However, if Jacobson is now forced to stop bidding all Armstrong projects, it will

be a severe blow which could lead to the demise of plaintiff's business.

(b) No irreparable injury to defendant.

39. At the close of his affidavit, Unger makes a feeble effort to show that Armstrong would be "substantially prejudiced" if it were ordered to reinstitute relations with Jacobson. Unger states that if a preliminary injunction is granted, "the result would be an administrative quagmire and a clash of personalities which would be of very serious proportions." (Unger Aff. para. 32). I am completely mystified as to how an "administrative quagmire" would be caused if Armstrong continued to do business with a major, reputable contractor, who has always paid its bills on time and who has accounted for millions of dollars in sales by Armstrong. Moreover, it is obvious that relations have not deteriorated to the point where Armstrong can't do business with Jacobson since Armstrong has agreed to fill all existing orders, including the Texaco job. If "personalities" is a reason for refusing injunctive relief, no distributor would ever be reinstated, since presumably some "personality" in the supplier's company would be offended by such reinstatement. I am advised by counsel that this is no reason for denying injunctive relief.

Sworn to before me this
12th day of June, 1976.

Dave Ellenhorn

DAVID ELLENHORN
Notary Public, State of New York
No. 31-4[illegible]372
Qualified in New York County
Commission Expires March 30, 19[illegible]

Exhibit A Annexed to Affidavit of John D. Jacobson

Memorandum from J. O. Sampson to J. E. Snyder,
Dated July 6, 1970

EXHIBIT A

473 a

J. E. Snyder, Bldg Prod Div, Philadelphia — July 6, 1970

J. O. Sampson, Bldg Prod Div, Rochester

[illegible]
Philadelphia Branch

In a [illegible] advised that they [illegible] their Philadelphia warehouse on [illegible] both the area sales stock in [illegible], the only Jacobson warehouse from which [illegible] will be Elizabeth. Jacobson is stocking [illegible] Elizabeth, and it will be either economical from their standpoint to carry two major lines at Elizabeth.

Accordingly, whether we like it or not, there will be Armstrong material show up on Jacobson jobs which are supplied from their Elizabeth, New Jersey, warehouse.

In our phone conversation, I told [illegible] that you were extremely reluctant to [illegible], creating [illegible] a workload you [illegible] their standpoint since they have been harassed with labor difficulties, and that the timing is bad from Armstrong's standpoint since it appears very likely we are going to have labor difficulties at both Pawtucket and Lancaster.

I told John that if we felt they had to serve their jobs from an Armstrong stock at Elizabeth, we would accept it. I told him that I would appreciate their not shipping any [illegible] direct from our factories, unless or until you are able to [illegible] in Philadelphia branch on a full-fledged [illegible]. I told him that if he were to close an order with us [illegible], we would have no way, legally, to refuse it, and, of course, he is right. I do not think we intend to do this as we both agreed that it would make a bad situation worse if we could work with their Philadelphia branch rather than merely tolerate them.

I guess, Jake, that this has finally boiled down to the place where I have to ask you for the overall good of the business to accept Jacobson's branch in Philadelphia. While I know you feel that timing is wrong, and I do recognize that we may end up with lower sales from the Philadelphia market because of this development, the only alternative is to close out Jacobson in New York, and this, I think, would be a bad move from the standpoint of the Company's overall business. While the volume we have received from Jacobson has been somewhat disappointing, nevertheless, it is substantial and about the equal of what we obtain from Berger. The comparative purchases are as follows:

BEST COPY AVAILABLE

24

Jacobsen - First Quarter - 1970 -- $162,000
Benjer - First Quarter - 1970 -- 199,000

Jacobsen - Year - 1969 -- $749,000
Benjer - Year - 1969 -- 626,000

[I am sure you will want to hear from Armstrong rather than from someone else that Armstrong materials will start showing up on Jacobsen jobs sometime after January 1.] I [illegible] that John Jacobsen would work with us in any fashion that [illegible] the question of when we might start shipping direct from our plants to Jacobsen jobs. This is bound to happen eventually, so [illegible] to give them a green light on this at the [illegible], I [illegible] a green light on shipments from their warehouse.

On the question of sales credit, whatever the book may read, we will make every effort to insure that the Philadelphia office gets full sales credit on any [illegible] that Jacobsen may ship to their jobs from their Elizabeth warehouse or on direct shipments from Armstrong plants into the Philadelphia territory.

I am sorry that our relations with a customer in another office has forced us to ask that you accept this. I don't see how we have any other course.

SED

R. C. Wiley, Bldg Prod Div, New York

Transcript of Record Proceedings of
June 16 [sic-June 15], 1976 Before Weinfeld, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

JACOBSON & COMPANY, INC.,

Plaintiff,

-against- : 76 Civil 2376

ARMSTRONG CORK CO.

Defendant.

- x

June 16, 1976,
2:15 P.M.

Before:

Hon. Edward Weinfeld,
District Judge.

Appearances:

MOSES & SINGER, ESQS.,
Attorney for Plaintiff,
By: David Ellenhorn, Esq.,
Eugene Farber, Esq.

JOHN WILKINSON, ESQ.,
DORIS SHAW, ESQ.,
Attorneys for Defendant.

Also Present: John D. Jacobson

THE CLERK: Jacobson & Company, Inc. v. Armstrong Cork Company.

MR. ELLENHORN: Your Honor, my name is David Ellenhorn, of Moses & Singer, and we represent the plaintiff, Jacobson & Company.

Your Honor, this is a motion for a preliminary injunction to restrain the defendant, Armstrong Cork Company, from refusing to sell its products, and in particular ceiling systems and ceiling materials to the plaintiff Jacobson & Company, which has been an authorized Armstrong distributor for approximately eight years.

Your Honor, Jacobson & Company is an old firm that was founded in the 1870s. It is a very prestigious and reputable firm, and its present business consists basically of two things: First, selling and installing as a contractor for ceiling systems in construction projects; new buildings principally throughout the metropolitan New York area, Philadelphia, New Jersey, and in that general territory.

The second part of its business which is a fairly recent development involves the direct sale of ceiling materials to acoustical, small acoustical contractors, schools, hospitals, and other institutions for rehabilitation work. That second aspect of the business has become of

greater importance recently because of the overall decline in construction work as I am sure the Court is generally familiar with in the New York area. There just is not a great deal of new construction work available, although there is some.

Therefore, my client last year, Jacobson & Company, began to diversify its operations, and has been stressing more recently the sale of materials, not the installation, but the direct sale to the consumers for rehabilitation work.

Now, the defendant in this case, your Honor, Armstrong, is by far the largest and most sought after distributor, supplier, and manufacturer of ceiling systems and ceiling materials in the United States.

Every one of Jacobson's competitors in the acoustical ceiling business in New York City in this general territory is an Armstrong distributor or has access to Armstrong products.

If the termination of the Armstrong distributorship is not stopped by a preliminary injunction, we will be virtually the only system, acoustical ceiling contractor in New York City or in this area that does not have access to Armstrong, and the effect on our business, as I will go into at some length later, would be devastating, your Hon

Now, on March 19, 1976, two of the defendant's officers went without any prior notice to my client's office in Elizabeth, New Jersey, and told him that the eight-year distributorship was terminated as of that date.

It was conceded at the deposition of Mr. Wiley, and as your Honor knows, we had expedited discovery in this case pursuant to your order -- it was conceded that no prior notice was given of any problem that would lead to such drastic action.

When my client was notified that it was to be terminated, that it was terminated, Mr. Unger who is the national sales manager of Armstrong told my client that there was only one reason for the termination, and he said the reason was that my client's sales had been declining, and that basically his operation had --

THE COURT: Has the defendant conceded that was the only reason?

MR. ELLENHORN: The defendant has now changed its position.

THE COURT: The defendant does not concede that now? What is the defendant's contention?

MR. ELLENHORN: The defendant's contention is that there were basically two reasons. First they say-- they didn't say it at the time, but they say in response

to the lawsuit -- that there were two reasons. One, they say the business was declining. On the expedited discovery we obtained sales records comparing our performance in the last three and a half years to the performance of every other Armstrong --

THE COURT: Was your business declining?

MR. ELLENHORN: No. Our business had suffered--

THE COURT: You are comparing. Was your business declining from what it had been previously with the defendant?

MR. ELLENHORN: Our business had suffered some decline from what it had been previously, that's correct, but what we feel is the significant point here, your Honor -- significant points are the following: First, Armstrong witnesses testified that in the 26 years that they could recall -- one of them had been with the company 26 years -- they had never once terminated a distributor or in the United States because their sales had been declining or because of anything of that kind.

The only distributors they could remember terminating, and they have about 300 distributors in the United States, approximately 15 in this area, were distributors whose sales had virtually evaporated.

For example, I asked them to recall for us some

of the distributors who had been terminated in the last 10, 15, 20 years. They mentioned one whose sales were $12,000 a year.

Our sales last year from -- our purchases from Armstrong were $600,000, and we rankthird in the New York area of their 15 distributors. We still rankthird of 15.

In 1974 we ranked second. Our purchases from them last year were three times those of the average distributor, Armstrong distributor, in the United States. So that the notion -- we submit that the notion that we were terminated because of some decline, especially when there has been a drastic decline in the New York area which has hit almost all of the contractors, simply does not stand up to analysis.

Now, your Honor --

THE COURT: What is the other reason?

MR. ELLENHORN: The other reason they gave for the first time in their papers was that there was a so-called -- to use their word -- deteriorating relationship with Jacobson which caused them to bring this eight-year distributorship to a halt.

Again, I asked them on the depositions, have you ever -- and the deteriorating relationship they define as stemming from complaints, they said, that Jacobson was

making, disputes that arose about certain jobs, pricing specifications, and so on.

Now, I asked them, have you ever terminated any other distributor in the memory of these witnesses, all of whom have been with the company for decades, because of disputes over invoicing on a particular job or matters of that kind. They could not recall single incidents.

We asked them to provide records showing the credits, credit memoranda, that were issued to Jacobson as a result of such disputes as compared to credit memoranda issued to other contractors in this area, and they provided this information, and it turned out that we basically ranked right in the middle, slightly above average in terms of the credits that were issued to us.

THE COURT: Weren't there entire memoranda which indicated rather strong views and attitudes about the plaintiff and its methods of securing the credits and harsh terms were used?

MR. ELLENHORN: Yes, there were, but I would like to address myself to that. My client is a fastidious person of fine reputation who does document and who does insist and persist when he believes he is correct.

There was a deteriorating relationship, and that was the cause of the termination, but the deteriorating

relationship, your Honor, I submit did not relate to a dispute about whether of the 500 jobs they did for us last year, which we used their materials -- they picked out three where there was a dispute -- three out of 500 approximately. That wasn't the deteriorating relationship.

The deteriorating relationship I submit came particularly in February of this year.

In February, and this counts several similar incidents in when Jacobson insisted on its right to resell Armstrong products outside of the territory to which they were attempting to confine us.

If I may give a little background for that. In the early -- we had maintained an office in Philadelphia, your Honor, since 1937. In 1970 we went to them and said, "We want to sell Armstrong ceiling systems in the Philadelphia area." They said, and there is a letter in the record from one of their chief executives in the area, that they had a sole,exclusive distributor in Philadelphia. A company called Berger Acoustical, and that they preferred for us to stay out of that area. They put it very strongly. They said, "Legally we can't prevent you from going in there."

THE COURT: I was just going to say they did say legally you could sell in the area, and you did sell in

the area, didn't you?

MR. ELLENHORN: First there is a letter from them that said "Legally you can sell." The letter was written by a lawyer for their firm, and it was clearly for the record, but they made it very clear to us that if we did sell, we were risking their ire, that they preferred for us not to do so.

When we asked them for prices in order to bid on jobs because this is a competitive bidding situation, and you don't use list prices, you use discounted prices, first they refused to give us bids. Then they gave us bids. Excuse me, prices, which were so out of line with what Berger Acoustical was getting, that we could not get the work.

Finally my client wrote a letter to the president of the company which my firm drafted quite frankly.

THE COURT: Why do you complain that their lawyers --

MR. ELLENHORN: I have no complaint, but I want to show the impact it had on their executives and what led to the termination. There was a dispute. We wrote a letter, Mr. Jacobson, to the president of Armstrong, saying "You are not letting us, or your company is not letting us compete in the Philadelphia area. You are

denying us prices and so forth."

Mr. Unger, the gentleman who actually made the decision to terminate us, principally made it, testified that when that letter was referred to him by the company's president, he was outraged, and he regarded it as a threat of litigation, which it in a sense was, and it was very obvious from his testimony that he felt that this company was in a sense a trouble maker. He was angered by our independent attitude.

Now, you take that as background, and we come now to the more recent events.

THE COURT: Before you leave that, I want to understand this. One of your complaints is as I understand it you could not get pricing information from the Philadelphia regional office, but you could get the information from the national office.

What is the difference? It didn't come through to me clearly. They insisted that because of certain administrative problems of their own, including this relationship with Berger, that they would not give out information that you sought with respect to a Philadelphia job.

What difference did it make if you got it from the national office, the pricing and everything else,

instead of from the Philadelphia office?

MR. ELLENHORN: There are several differences.

First, it might not make any difference if you got the same price, if you got the same discount he was getting.

THE COURT: Are they compelled to give you the same discount?

MR. ELLENHORN: We think the law compels them to, yes. Second --

THE COURT: You can't give varying prices? They must give the same price on the same product?

MR. ELLENHORN: We believe so.

Second, your Honor, there is a great deal that's involved here beyond just getting a price for a particular job. There is an entire relationship that develops between a local office -- they have a sales regional office in Philadelphia -- and an authorized distributor there. They felt it was an important difference because when we insisted on access to Philadelphia, they wrote memoranda internally, which we have submitted in our reply papers, saying to their Philadelphia salesmen, "We know this is going to create a problem for Burger, but we may have to swallow it and so forth."

Now, your Honor, the issue here quite frankly,

although I would be happy to go into this matter, is not so much -- we are not presently pressing a claim for damages for the business we may have lost in Philadelphia. That's an issue for the jury.

The issue now is why were we terminated in 1976, and if I may come up to date with the recent events that led to that termination, which tie into this background. In 19 --

THE COURT: That's the Atlanta sale?

MR. ELLENHORN: It's two things, the Atlanta sale and the supply center operations, and the complaints they got from Berger, if I may address myself to those matters.

Needless to say, we have not had an opportunity to depose the Atlanta competitors and so on. This is our position at this time based on the record as we have already established.

In 1975 we opened a supply center, as I mentioned, to sell materials throughout this area.

THE COURT: Which area?

MR. ELLENHORN: The general areas Jacobson does business in, metropolitan New York, New Jersey, and Philadelphia basically. Those are principal areas.

Now, we sent out about 6,000 advertisements.

I don't mean 6,000 different ads, but maybe a dozen different ads to 6,000 different recipients, customers, potential customers in Philadelphia alone. I'm just limitin myself now to Philadelphia. Advertising the supply center's operations.

On discovery I got what is Plaintiff's Exhibit 5 for identification, which was one of the announcements we sent out, which was an announcement of a discount sale of Armstrong products that we had in our inventory.

Berger Acoustical got this. This was revealed at the depositions, and Berger Acoustical turned it over to Armstrong Philadelphia's office complaining about it, and the Philadelphia office shot it up to the headquarters of Armstrong in Lancaster, Pennsylvania, and Mr. Unger wrote the following on it: He said, "Here is an example of what I mean. We will hear about this from many of our Philadelphia customers. These people don't give a damn about Armstrong. They never have and never will. I doubt very seriously if the money we will get in 1976 is really worth the grief."

Now, your Honor, we do give a damn about Armstrong which is why we are fighting very hard to maintain our distributorship, but this was the deteriorating relationship.

We were insistent upon our right, and I think the

Schwinn case says clearly that we have the right to sell in Philadelphia, to sell at whatever prices we want, and to sell to whatever customers we want.

Berger didn't like the competition obviously, complained about it, and this was the response.

Now, a few months later we come to the Atlanta incident. In February of this year Jacobson was to bid on a major federal office building in Atlanta, Georgia, which involves an unusual configuration of materials for a ceiling system that would have to meet government performance criteria.

In order to determine what supplier to use, because we do from time to time use other suppliers, although Armstrong is by far our principal source of materia

THE COURT: You used to use four other suppliers, didn't you?

MR. ELLENHORN: That's right, but we have figures we can present to the Court which will show that Armstrong overwhelms them in terms of our needs.

THE COURT: Before you had this distributor relationship with Armstrong, what firms did you use?

MR. ELLENHORN: This was prior to '68, and we used a firm called Conwed and Celotex,

Your Honor, my client is here, and if the Court

would like any elaboration on the relative purchases we make from Armstrong versus these others --

THE COURT: I will rely on the papers.

MR. ELLENHORN: We will be happy to provide it, but Armstrong is by far the principal source. It is the favorite. It is the premier product in this area, and architects insist on it frequently. They specific it, or they give you specifications that only Armstrong can meet, even if -- the government I think, for example, is precluded from specifying a particular supply, but they can give you specifications that must in fact come from one company.

We wanted to bid on the job in Atlanta. Mr. Jackson approached -- and there is no dispute on the facts on this. There is an internal memo from Armstrong that was exactly consistent with our own recollection of the fact

Mr. Jacobson approached Armstrong -- one of the employees did, and said, "We'd like a price for that job from you, and we'd like your technical design, like data and so on, to consider using Armstrong." That gentleman, Mr. Lopez, from Armstrong, went back to headquarters, and headquarters said, "We don't want Jacobson bidding on a job in Atlanta because we have" -- as he said in his own memo, "We have several local contractors in Atlanta bidding on the project, and we feel we have adequate coverage,"

so they went back to Jacobson, and they said, "We are not going to give you a price because we are satisfied. We don't want you competing with our local people." Mr. Jacobson said very persistently, because in this respect he is persistent in exercising his legal rights -- he said, "I have a right to do work in Atlanta. This is the same problem I had in Philadelphia several years ago." The man then said to him, "We will give you a price if you commit yourself to using our materials if you are the lowest bidder on the job," which I think itself raises antitrust questions, but Mr. Jacobson could not give such a commitment. It was not proper to ask for it. He had to consider other sources of supply because he has to be the lowest bidder to get the job. He said, "No, I won't give you that commitment," and I insist on my legal right to do that job with Armstrong."

Only then did the man back down, and give him the quote.

Now, your Honor, that was on February 19th. Four weeks later we were terminated and it is our position that, and no plausible explanation was given to us except the one that "Your sales are declining," and when we looked at their figures, it turned out they declined in the sense we were number 1 and we are now number 3, if you call that a

decline.

We submit, your Honor, that the reason -- that there was clearly a nexus between our efforts to sell Armstrong products in Philadelphia, in Atlanta, and so on, and the termination, and the Court is well aware of the fact, and I needn't belabor the fact that we are not required at this time to conclusively prove our case. We are only required to, as the Court said, the Second Circuit said, the Second Circuit said in the Checkers case, we are required to raise serious substantial and difficult questions that are a fair ground for litigation, and we think we have clearly done that.

THE COURT: You have to go beyond that.

MR. ELLENHORN: I would like to come exactly to that. Your Honor, if we don't have access to Armstrong products, and my client again is here and can elaborate if necessary, we simply cannot compete.

This is not an exclusive club. Armstrong distributors are many in number. There are 300, as I said, in the United States, and 15 in New York City.

Every single one of our competitors is an Armstrong contractor or has an Armstrong distributor.

There is very little construction work left in New York, as your Honor knows, new construction work left

in New York, as your Honor knows, new construction work. It is a market that's dried up substantially. It's become a very tough thing to surv. e in this atmosphere where there is very little construction.

For us to lose our principal source of supply, a source which all of our competitors have, would result first in the immediate distribution of our supply center. Our figures show that the supply center, which is the most -- although it is a newly opened division of the business it is -- one of the most profitable aspects of the business. The markups and so on make it a real profit center. 78 percent of the sales made by that supply center in 1976 involved Armstrong materials. There were materials of other companies that were sold as well, but 78 percent was Armstrong.

We checked today, and the inventory that we have in the supply center of Armstrong materials is beginning to run out. It's already run out of certain items, and within 30 days will be virtually depleted, so the supply center will be completely nullified.

With respect --

THE COURT: Didn't they offer to fulfill orders that were on hand?

MR. ELLENHORN: Yes, but those don't refer to the

supply center, if I may explain. What they said was that on any new jobs -- any jobs that we had obtained that is construction work, installation work, that we had obtained as of March 19th, they would fill those jobs, and there was over a half a million dollars in work that we had already obtained as of March 19th, and they will fill those orders during the rest of '76 and into 1977, but we are precluded, unless we get a preliminary injunction, from bidding on new work.

Now, we have a list of half a dozen jobs that are coming up within the next 60 days for example. These are office buildings and various other types of construction work in the city and around the city that well, as a practical matter, not be able to even bid for because Armstrong materials are the prime material that would have to be used in those jobs.

THE COURT: Weren't most of the invitations for bids obtained by --

MR. ELLENHORN: Your Honor, my understanding is that --and my client of course is far more expert in this than I am.

THE COURT: I am not taking testimony now. You have your papers completed. There is no occasion for it. You haven't asked for it.

MR. ELLENHORN: I didn't suggest that we were.

THE COURT: I simply asked you a question. Don't most of the invitations to bid -- you ought to know this. If you don't know, say so -- contain sort of an equivalency provision?

MR. ELLENHORN: I believe many do. I don't know the exact figures, but my understanding is and my client's reply affidavit so states that as a practical matter, and he's gone into detail about this, there are no equivalents to many of the Armstrong systems. So that whether the architect has said we can use equivalent systems or substitutes, as a matter of paying lip service to the notion, the fact is there are no equivalents.

We have compiled records showing how many jobs we did, let's say, during the last two, three years, which we could never have obtained without Armstrong, and they are the majority of the jobs that we did, so that as a practical matter, although the architect may say, "You can use other systems or any system you choose," it's the Armstrong system that is the principal system in this area in the United States.

Your Honor, in the Minolta case we rely heavily on, Interphoto v. Minolta, Judge Herlands in that case issued a preliminary injunction for a distributor who had

been terminated, and the Second Circuit upheld his order.

The plaintiff in that case had other sources of supply besides the defendant. But the plaintiff pointed out, and it is true here too, that in order to be competitive, he needed a full line of distribution, a full line of products, a range of products.

I'm not here to tell the Court that we will not be able to do any work whatsoever without Armstrong. That is not true. What I am here to tell the Court is that in a highly competitive market with declining opportunities to lose your principal source of supply would have a devastating effect on your business, that not only would you lose income and revenues, your relationships with your architects, your overall reputation would suffer.

One of the things we have to sell is the fact that we can provide Armstrong.

THE COURT: How long have you been in this acoustical ceiling setup business?

MR. ELLENHORN: Since the late 1930s.

THE COURT: I come back to the question I asked you before, and I am only asking these questions for the purpose of information. Up to I believe 1962 you never used the Armstrong products.

MR. ELLENHORN: '68. That's correct, but

Armstrong --

THE COURT: Then I am trying to get information up to that time you functioned in this area without the use of the Armstrong products.

MR. ELLENHORN: That's correct.

THE COURT: One other question. You used the expression in your papers quite a bit. I think I know what you intend by it, that the Armstrong people have proprietary items. What do you mean by that? Patented items?

MR. ELLENHORN: Not patented, but items for which there is simply no competitive substitute. It is a combination -- let me explain, your Honor.

These are what they call integrated ceiling systems. They don't just involve mineral tile as they used to ten years ago. These are complex systems, your Honor, involving air conditioning equipment, lights, ducts, tile board, and so on, and for these new offices there are requirements frequently for an integrated system that Armstrong has developed that nobody else has been able to match.

If I may give one example, we recently obtained a very important job for Texaco in White Plains. They are putting up a new building in White Plains. We will be the subcontractor who will install the ceilings. This is

going to involve $800,000 approximately for us." It is an $800,000 job. This is a very, very substantial job.

Armstrong is going to supply the ceiling materials. My client has stated in his affidavit, and it is a fact, that there was no other source of supply for that job. He could not have matched what the architect was looking for without the Armstrong integrated system. There are many other factors involved.

Armstrong witnesses testified, for example, that they admitted that their sales efforts -- they have a leading sales force in the United States. Their advertising far surpasses that of their competitors. They have about 35 percent of the total market according to their testimony. We haven't had a chance to explore that in dep

It is true that prior to 1968 we didn't have Armstrong, and the reason we wanted to become an Armstrong distributor in 1968 was we felt we could not be competitive without being an Armstrong distributor because they were becoming increasingly sought after, and as I said several times, every single one of our competitors in this area is an Armstrong distributor.

Finally, your Honor, in terms of the balance of hardships, I would like to address myself to the

hardships that they claim they will suffer if an injunction is issued.

They don't question the fact that our credit is good. We have a net worth of about a million four. We have always paid our bills on time. There is no issue as to that.

They have sold us for eight years. We bought over five million dollars in ceiling products from them over the last five years, I believe.

If the injunction is issued, we are willing to enter into any kind of stipulation for an expedited trial and so forth that is reasonable.

Let's assume we had a trial, whenever it may be, six months, three months, whenever the Court would set from now. Obviously there is going to be no injury to them, no financial injury if they have to continue dealing with us during that interim period.

They say, well, there would be a personality clash There is friction between the two companies they say, and there would be administrative difficulties and personality clashes.

With all due respect, we submit that that is too ephemeral to amount to any kind of an argument.

If personality clashes are involved, this is a

giant company, if they are going to offend by the fact that they have to do business with us, I don't think that rises to the level of irreparable injury or any kind of injury.

They testified that they have no plans presently to replace us with anybody. They haven't done so in three months. If they want to add any other contractors as distributors, they are free to do so. They have 300 distributors now. Making us 301 is hardly going to injure them.

What I am saying in substance is that the balance of hardships clearly, I submit, tips very heavily in our favor. We must have Armstrong to be competitive. Our supply center will be totally closed in 30 days if we don't have Armstrong, and there will be no injury to them aside from the hurt feelings of some officials who terminate us if the injunction is issued. Thank you very much, your Honor.

THE COURT: Before you sit down, what percentage of your business comes within the area that's involved in this litigation?

MR. ELLENHORN: Between 80 and 90 percent of our business involves ceiling systems, and between 10 and 20 percent of our business involves -- or even less.

May I confer with my associate, your Honor, in answering your question.

Your Honor, the answer is this: Contrary to to the assertions in their papers, up until 1976, about 80 percent of our business involved ceiling systems, and only about 20 percent involved partitions, room partitions. That partition work was done principally as I understand it, for the City of New York, and there isn't much work for the City of New York any more, and, therefore, in 1976 virtually 100 percent of our operations involve ceiling systems and materials, so the allegation in Mr. Unger's answering affidavit that a majority of our business does not involve ceiling systems is completely without foundation. It is 100 percent as of this time, and it's been about 80 percent up to now.

THE COURT: Granting an injunction is a drastic remedy.

It amounts to the full relief pending the trial that you could get only after trial, after you have established your claim. There are disputed fact issues here. Why if you do succeed finally and injunction had been denied would your client have lost anything?

MR. ELENHORN: For two reasons, your Honor. First of all, admittedly the case was a little more

drastic but as Judge Friendly pointed out in the Simms case what my client wants is to run a ceilings business. There he was talking about the Ford --

THE COURT: Wthat was an exclusive franchised dealer.

MR. ELLENHORN: I understand.

THE COURT: They have been in business for 20 year: There was no other franchised dealer in the area and I think the facts are quite different here.

MR. ELLENHORN: Your Honor, the facts then are no different in this case.

THE COURT: I think they are.

MR. ELLENHORN: They are different from Simms. I was going to refer to another case. I think the facts here are as compelling and the answer is the same as Judge Herlands gave.

THE COURT: You referred to that case before. Let's not go over it.

MR. ELLENHORN: The answer, your Honor, is that what my client is seeking is the right to continue in business and not to obtain damages at some time in the future and he honestly believes in view of the unusual situation in New York in the construction field that if he isn't able to compete with other ceiling

contractors, all of whom have access to Armstrong products, that it might be the demise of the company, which is suffering to some extent.

THE COURT: Your client has been in business for how many years? 80 years or so. To say he will be forced out of business awaiting trial in this case -- you are not serious.

MR. ELLENHORN: I am serious about it. We are spending this money.

THE COURT:You are not serious?

MR. ELLENHORN: I am, your Honor.

THE COURT: I would suspect that they have some means of survival.

MR. ELLENHORN: Well, I don't think --

THE COURT: To continue the existence of the firm at least as it's been built up in the papers, and I have accepted that as fact.

(Recess)

MR. WILKINSON: Your Honor, my name is John Wilkinson from Donovan, Leisure, attorneys for Armstrong Cork, defendant Armstrong Cork in this action. Your Honor, I hope our position was made clear in our papers, and I am not going to take your time simply reiterating and repeating what we said in those papers, but what I

would like to do is briefly touch on some of the things that were said in a supplemental memorandum purporting to summarize the deposition testimony which I understand was served on our firm around noon on Saturday, and also in the reply papers that were served on Donovan, Leisure around noon yesterday.

I want to come right down to the issue, at least one of the key things we have to look at. It is not whether Armstrong cut off one of its largest distributors, which it didn't do. It is not --

THE COURT: What do you mean they didn't cut off the distributorship? That's what the plaintiff's claim is.

MR. WILKINSON: The issue isn't whether or not they cut off their largest contractor-distributor, which they didn't. That's not the point. It is not whether they used good judgment or whether they used bad judgment. What is at issue, your Honor, is so far as likelihood of success on the merits is concerned is one very simple thing. Was it done pursuant to a conspiracy to violate the antitrust laws.

There are two cases cited in the reply memoranda of the plaintiff which purport to cite the proposition, your Honor. The cases that I mentioned that you don't have

to have a conspiracy in order to have a violation of Section 1. The first, Sylvania v. Continental TV is a case frankly that we intended to cite in our papers, and we just neglected to do so in the rush. What did it hold?

It did not preclude a manufacturer limiting a distributor to a particular territory. It held that--all that it precluded was a manufacturer forbidding a distributor from selling in his territory to somebody who came into the territory from without. It does not say anything about there not having to be a conspiracy in order to have a violation of Section 1.

THE COURT: You are not claiming that they must prove a conspiracy in order to prevail in this case, are you? Are you claiming the plaintiff must establish a conspiracy so as to prevail in this case?

MR. WILKINSON: Yes, we are, your Honor. Sure.

THE COURT: There cannot be an antitrust violation and a restriction of competition by an individual manufacturer unless he is in a conspiracy? Is that what you are contending?

MR. WILKINSON: That takes us into the second point.

THE COURT: Let's stick to the first point.

MR. WILKINSON: If you are talking Section 1 of the Sherman Act --

THE COURT: I'm not talking any specific section. I'm talking about the antitrust laws.

MR. WILKINSON: Let's talk about the antitrust laws in general. As soon as you leave Section 1, at that point you are talking monopolization. In order to have monopoly power, you have to have a significantly greater share of the market, whatever the market might be, and we don't know what it is at this preliminary stage.

THE COURT: You said you have 36 percent as I remember of the market.

MR. WILKINSON: It is less than that, your Honor, nationally. That's right. Judge Hand in the Alcoa case made it perfectly clear. He said that just simply isn't enough.

THE COURT: Of course you know that is not the last word on percentage of market.

MR. WILKINSON: It was cited with approval for instance in antitrust developments which is one of the latest words on the subject.

THE COURT: I thought the Supreme Court cases were the latest words.

MR. WILKINSON: That might be, your Honor.

THE COURT: Might be?

-- took precedence over the Supreme Court rulings. I know some attention is paid in some circuits. I didn't know they were so authoritative, that they took precedence over Supreme Court decisions.

MR. WILKINSON: I know of no Supreme Court decision that has held that considerably less than 35 percent of whatever the market is is sufficient to constitute monopoly power.

THE COURT: I want to understand your position. Are you claiming that in order to establish a claim of restraint in competition or competitive restraint that there must be proof of a conspiracy?

MR. WILKINSON: Yes.

THE COURT: That unilateral conduct on the part of the manufacturer cannot be sufficient in certain cases?

MR. WILKINSON: Absent monopoly power, that's correct.

THE COURT: Go ahead.

MR. WILKINSON: Your Honor, I was talking about the Sylvania case. It does not stand to the contrary. The proposition for which it is cited on the subject of conspiracy at page 19 of the reply brief that plaintiffs have filed was a cite, almost a direct quote, from the

dissenting opinion not from the opinion of the majority.

With respect to the second case that they cite Hobart Products Company v. Gilliland, that was miscited. The correct cite is 471 Fed. 2nd 894. In that case the distributor, who is the plaintiff, was also a manufacturer who competed with the defendant manufacturer. Thus to the extent that there was an allocation of territories that was forced by the defendant manufacturer, it was done pursuant to a horizontal conspiracy between competitors.

Well, let's take a look at what the purported conspiracy is in this case because I think it is the nub of the very issue. The purported conspiracy which plaintiff said they can prove is that Armstrong Philadelphia office, its regional Philadelphia office, conspired with Berger, an Armstrong contractor-distributor in the Philadelphia area to keep Jacobson from selling outside its primary area of responsibility around here into the Philadelphia area. What does the record show on the subject? Mr. Unger says that this wasn't taken into account at all, and he was certainly involved in the termination decision, and he said that by 1975 the sales of Jacobson in the Philadelphia area were so miniscule that even if it is the kind of thing that would have been taken into account, it wouldn't have made any difference anyway.

Mr. Snyder, who was the regional manager for Armstrong in Philadelphia, said that he wasn't even consulted on the termination decision. He didn't even know it was under consideration until after Mr. Jacobson had been notified.

Mr. Snyder also said he at no time ever discussed possible termination with any contractor-distributor in the Philadelphia area.

Well, against this background, we find cites in the plaintiff's reply papers to testimony by Mr. Snyder for instance, and they have in quotation marks things such as getting some feedback from Berger about a sale, some feedback from Berger about special prices at which the materials were to be sold. These citations are at page 4 and 14 of the supplemental memoranda that we received on Saturday.

I am not saying Mr. Snyder didn't talk about feedback from Berger. I am not saying he didn't talk about having heard about special prices from Mr. Berger, but what is this all about? Mr. Ellenhorn talked about it, and I'd like to talk about it.

In October, 1975, the Jacobson supply center, which you have heard about considerably today, and it is covered to some extent in the papers, issued a price circuit

advertising Armstrong products at 33-1/3 percent off Armstrong prices.

Mr. Unger was irritated for two reasons, not because Jacobson was selling at low prices. That's Jacobson's business, but he was irritated because the Armstrong prices to its contractor-distributors, which are confidential and could be very useful to non-Armstrong contractors in bidding against Armstrong contractors were published by Jacobson when it was understood that that is not something to be published to competitive contractor-distributors.

He also thought that the flyers failed to refer to a warehouse sale, and that the specific reference to Armstrong could indicate to other contractor-distributors, other Armstrong contractor-distributors, that Jacobson was getting a special price from Armstrong.

Mr. Unger made clear in his testimony when there was talk about a feedback from other contractors, feedback insofar as special prices were concerned -- there was a feedback about special prices that the contractors thought Armstrong was giving to Jacobson not about the discounted prices at which Jacobson was selling. That was Jacobson's business.

Page 116 of the Unger transcript, your Honor, is a-

THE COURT: Supposing Jacobson did that, would that

be a basis for terminating the dealership?

MR. WILKINSON: Talking hypothetically, your Honor, if Jacobson sold at 33-1/3 percent off Armstrong prices, and contrary to what the facts are, if Armstrong just didn't like them selling at the cut rate prices, it is Armstrong's business whether to terminate for that reason. If they terminated for that reason, it is of no antitrust consequence unless it is done pursuant to a conspiracy.

THE COURT: How about the Atlanta situation which the plaintiff claims really triggered this whole thing where they asked that the prices for Armstrong, which Armstrong was prepared to give them upon the condition that the Armstrong product be used, and they refused to accede to that request, and I think that plaintiff claims that essentially that's what triggered the entire setup.

MR. WILKINSON: Your Honor, first of all --

THE COURT: This Philadelphia business took place quite some while back, you know.

MR. WILKINSON: That's right.

THE COURT: I am not sure there is any nexus to use the plaintiff's term there. They think there is, but more directly they refer to the Atlanta setup where they sought to get into the Atlanta market and made a bid for a federal building there, and asked Armstrong for

prices which,as I just said a moment ago, Armstrong said it would give upon a condition to which they refused to accede What is your position with respect to that?

MR. WILKINSON: Your Honor, at the outset let me keep saying the same legal principle. I'd like to talk about the facts as far as Atlanta is concerned.

Number 1, no proof of any conspiracy whatever--

THE COURT: Take the situation, assume the state of facts as advanced by the plaintiff is correct. Must there be a conspiracy on the part of the defendant in order to bring into play the antitrust provisions? You say in this situation that the only way that can be established is by showing that Armstrong was in a conspiracy with somebody else, perhaps the local dealers, and if Armstrong took the position, "No, we are not going to give you these prices. We don't want you in the area," that's not a restraint on competition on the basis of unilateral action independent of cooperation with anybody else. Is that what you are saying?

MR. WILKINSON: If Armstrong did that, your Honor, pursuant to an agreement with Berger, sure.

THE COURT: Berger has nothing to do with Atlanta. Berger's in Philadelphia.

MR. WILKINSON: If they persisted in that

position, and Armstrong didn't like it, and they didn't conspire with somebody, and this is all hypothetical facts, because it is not what happened, but if it did happen, and Armstrong unilaterally made the decision they didn't like that, and they were going to terminate Jacobson, yes. Our position is it does not violate the antitrust law.

THE COURT: Coming back to your question of a monopolization that Armstrong was the only one that had the products that were specified in the bid proposals, is that what you are saying?

MR. WILKINSON: Your Honor, first of all that's not the fact. We are talking hypotheticals because that would be a very, very rare --

THE COURT: They claim these are proprietary items. That's the way they described them, and many of the offers to bids specifically refer to those items, and there is no other firm from whom to obtain them.

MR. WILKINSON: Mr. Unger made it perfectly clear of two things in his affidavit.

Number 1, that the number of times that Armstrong is specified alone in a specification is very, very rare.

Number 2, when it does happen, 60 to 70 percent of the time those specs are broken anyway.

Number 3--

THE COURT: What do you mean they are broken anyway?

MR. WILKINSON: Despite the fact it says Armstron somebody goes in and bids a competitive product and gets it. It happens 60 to 70 percent of the time according to Mr. Unger when Armstrong is specified by itself in a specification.

Lastly, we already touched on the fact that such specifications seldom appear insofar as federal government bids are concerned, and that they seldom appear on very large jobs, which is what Mr. Jacobson has been concentrating on recently, so it is just not a problem that is going to be run into.

But I want to turn to Atlanta for a second, your Honor, because you asked specifically about that. That was a federal office building project. That's a very, very complex business, as I understand it, insofar as the ceiling business is concerned. It involves a lot of work for a manufacturer to put together a bid or put together a package that will satisfy the requirements of a very large project such as a federal office building.

When Armstrong would do this for Jacobson in New York, Jacobson would take that information which would

be very much to his advantage if he were going to bid competitive products against other Armstrong contractors, and would bid the competitive products against the other Armstrong contractors safe with the knowledge of what the other contractors had in mind and what they were going to pay Armstrong for the goods.

Armstrong could not do anything about that. They didn't want to. But they did it, but then we come to Atlanta. That's another federal office building. Jacobson came to Armstrong and they said, "Look, how would you react to giving us a quote insofar as Armstrong materials are concerned on that building down there." They didn't demand anything. They said, "Give us a choice" or "You have a choice."

The memoranda that's attached to the reply papers submitted by the plaintiff make that clear. It is a memorandum from Mr. Lopez to Mr. Wiley, both of Armstrong, describing the situation. It says, "They asked me if we would like to quote them on the project and others like it across the country. They stated that they knew we could not legally refuse the quote. However, they said if we didn't want to quote them, we didn't have to, and they would bid other manufacturers' material."

On that basis Armstrong said, "All right, you are

giving us choice against the background that I have just described. No, we just as soon not." At that point Jacobson turned around and said "Well, all right now I insisted," and Armstrong said, "Well, are you going to bid our products if we give you a quote?" He said, "I'm not going to be committed to that." He gave them the quote. He didn't insist on that. He went down. He bid competitive products, and he won the bid.

Now, no conspiracy. No refusal. That's the story.

THE COURT: Was the building completed with Armstrong products?

MR. WILKINSON: Excuse me?

THE COURT: Was the building completed with Armstrong products, the federal --

MR. WILKINSON: I understand not.

THE COURT: In other words, they bid a competitor's product?

MR. WILKINSON: Yes, your Honor. Absent proof along the lines such as the foregoing, the attack that was utilized on the depositions and in the papers that we have seen is to pick and pick and pick and pick at Armstrong's business reasons for terminating Jacobson. Apparently the thought is that they can undercut the reasons

and leave with you that the impression that the reasons are not valid. Then from that you would infer some sort of a legal wrongdoing.

This turned into a numbers game. As a matter of fact, Armstrong can play the numbers game just as well at trial if we have to as Jacobson can, but in any event, we hear things in the reply memo such as a lot of other Armstrong contractors made purchases that are less than Jacobson's. Our distributors operate out of only one office. Jacobson's sales force is still no smaller than some other contractors in the area. This is all irrelevant at this point.

But let me say two things. Number 1, you really would think that this was a motion for summary judgment when we get into this kind of thing. It is almost as though we had moved for summary judgment and they were trying to put together something, something to hang their hat on to raise an issue of fact that would preclude summary judgment in Armstrong's favor. We may come to that. We may have to face that, but not at this point.

Second, Jacobson had a huge area of primary responsibility. He covered New York City, all five boroughs, covered Long Island, covered Westchester, covered northern New Jersey. And so on. To compare Jacobson's

volume of sales for instance given this area it had, with somebody like Island Acoustics who is primarily limited to doing business out on Long Island, to say the least, it a a bogus comparison.

If you want to talk Long Island I am perfectly sure you are going to find that Jacobson did much worse than Island Acoustics when given that particular area.

Passing away from the numbers game, the fact is that in early 1975 Mr. Langan, one of the two Armstrong people primarily responsible for the Jacobson account wrote two memos which were strongly critical of Jacobson, and one of which recommended termination. This was early 1975. Plaintiff says the following about these memos in its reply memorandum. Page 10, it was the narrow view of a low level employee no longer with Armstrong whose recommendations carried little weight. Another sales representative, Robert Baram was responsible for the metropolitan New York area, Jacobson's principal territory, and Baram did not recommend that plaintiff be terminated.

Well, aside from the fact that Mr. Langan left under the very best of circumstances for a very lucrative position elsewhere very recently, let's stop and look at what Mr. Baram is saying at the time. According to Jacobson, and according to their papers, Mr. Baram is the

kingpin we can look to for authoritative opinions on how Jacobson -- in early '75 what did Mr. Baram say? He said, "In New York City it is my belief that our coverage is adequate when you look at the number of large contractors, but it is not adequate when you look at two of them who are floundering." They are James A. Phillips and Jacobson. That's Mr. Baram. Did Mr. Baram change his mind from early 1975 to early 1976? No. In early 1976 he said "Jacobson was nowhere in 1975. Their entire organization was decimated. Their Long Island operation died with the departure of Hank Epstein. Their New York staff was cut to the partners and three estimators. I see Jacobson as a very small part."

In early '76, Mr. Langan, and I won't bother you with more quotes, your Honor, but Mr. Langan with a year's more experience with the company at that point, precisely echoed Mr. Baram's feelings. These were the only two people responsible for the Jacobson account, directly responsible. They were unanimous in their view as to what should be done and they expressed it in writing as to why they thought it should be done.

Your Honor, turning to the question of irreparable harm, if all of this were proved at trial, if everything that we hear on this motion were proved at trial, and there

is nothing in the record to substantiate basically anything, this wouldn't be a case for a permanent injunction. In not being a case for permanent injunction, it is just simply not a case for a temporary injunction. This is a damage case. We all know you don't need much to establish antitrust damages. We all know the Supreme Court cases that say that under circumstances such as this the standard of proof is pretty low. We contend with such cases every day.

More important, plaintiff really knew, and I point to various instances of jobs he said he could not have gotten without Armstrong. Mr. Ellenhorn did it toda Mr. Ellenhorn also said today -- he talked about we are not seeing right now damages in the Philadelphia area. We may prove that at the trial. If you can do that, there is not the irreparable harm --

THE COURT: He goes beyond the claims that he would be put out of business if he doesn't fill orders from here out.

MR. WILKINSON: I can't see that. I think Mr. Unger's affidavit contains such facts to make it clear that that's not going to be the case. He was in business for many, many years up until 1968 without Armstrong, and I think he will be in business for many, many years into the future without Armstrong.

We have heard again and again and again on this subject that every one of Jacobson's competitors is an Armstrong contributor-distributor. In paragraph 31-I and 31-J of the Unger affidavit Mr. Unger makes it clear that that just isn't so. I can anticipate your question, your Honor. You are going to ask me who are the others, and before you ask, let me say that I don't have the names with me right now, and I am suggesting that we submit a list to you. If you want us to, we will be happy to.

THE COURT: He made the categorical statement that that's so. Every one of his competitors does have a supply from Armstrong. Isn't that a significant factor?

MR. WILKINSON: It is a significant factor.

THE COURT: If it is true. You say it isn't true.

MR. WILKINSON: Mr. Unger makes a statement in his affidavit that it is not true.

THE COURT: Is that enough to raise the issue? Who are the others?

MR. WILKINSON: Let's look at it this way. There are six Armstrong contractor-distributors of ceiling products in the five boroughs of New York City. Do you really think that's all there are?

THE COURT: I don't know. I get information from papers. I start from scratch, you know.

MR. WILKINSON: Mr.Unger said to the contrary, but --

THE COURT: I only have what's before me.

MR. WILKINSON: That's paragraph 31-J and J of Mr. Unger's affidavit.

Turning to White Plains, I just want to talk about that for one moment because we are told that that's a prime example of an instance where Mr. Jacobson could not have gotten the contract without Armstrong, and what happened a few weeks ago? Mr. Jacobson called up Mr. Wiley, who is the New York regional manager for Armstrong, and he said to Mr. Wiley, "I've got a great price from"-- I believe it was U.S. Gypsum --"as far as White Plains is concerned. If you can't meet the competition, I'm not going to bid Armstrong, I am going to bid U.S. Gypsum." That's the job he could not have gotten without Armstrong.

Turning to competitive substitutes briefly, page 17 of the reply memorandum, the plaintiff says that Mr. Wiley said that there were no competitive equivalents for many Armstrong products. In this instance we got a citation for the record. It was Wiley 166 to 168.

If you turn to those pages we found it had nothing to do on the subject at all. I think what they meant was Snyder, 164 to 168. Mr. Snyder, being the Philadelphia

regional manager, and those pages did deal with the subject. What did Mr. Snyder say at those pages? He did say he could not think of any substitute for an Armstrong product known as ATS, which is not ceiling tiles. It is a suspension system, but he went on to say he was asking if he knew of any company offering the same range of ceiling products as Armstrong. He said "Sure. For instance, Conwed, Celotex, the two Gypsum companies." He was asked "Do you know of any company with a system competitive with Armstrong's Luminaire?" He said, "Sure Ceiling Dynamics, Inc., Donn." He was asked "Do you know of any single competitive item that has been as widely accepted as Armstrong Sanserra pattern?" He said, Sure, U.S. Gypsum's Glazier. I think that's what they intended to cite.

Your Honor, there has been I think some confusion I just want to straighten it out.

There are two very, very different things that are being talked about here. Number 1 is the question of whether Armstrong appointed Jacobson as a contractor-distributor, official contractor-distributor, in the Philadelphia area. That's one of them. The answer to that was always no. "We have perfectly adequate representation in Philadelphia, and we are not going to appoint you there."

The second question is whether Armstrong did

anything to prevent Jacobson from selling outside its prime area of responsibility into the Philadelphia area. The answer to that is also no. No such thing was done. We hear about discriminatory practices. Jacobson had trouble getting services in Philadelphia. The only thing we heard about that day was prices, different prices. Jacobson we are told had to pay higher prices for jobs in the Philadelphia area than Berger, the local distributor, did.

Number 1, it is not true. Number 2, there is nothing in the record to substantiate that.

Further on the question of this confusion, we hear over and over again cites back into the early 1970s saying that Mr. Snyder, the Philadelphia regional manager, didn't have any interest in Jacobson selling in Philadelphia. What he didn't have any interest in, and the documents are clear, is having Jacobson appointed a contractor-distributor in Philadelphia. He always recognized their legal right to sell into Philadelphia from outside, its prime area of responsibility.

Your Honor, just one more quick word on why the termination.

THE COURT: What do you say the reason for the termination was?

MR. WILKINSON: That's just what I am getting into.

Jacobson had a huge area. It wasn't performing. Its sales in 1975 were down. There is no question about that. They might have been still higher than some other distribu who had smaller areas of responsibility, but the overall performance was very poor and the reasons were as follows: Number 1, they were bidding only very big jobs. They weren't covering the whole spectrum of the market from Armstrong's point of view, and while their sales were down, what's much more important, they were closing very few bids as far as 1975 and 1976 is concerned.

Sales in 1975 reflect bids that were caused in 1974, '73 and maybe previous. So when you look at 1975 and you see the number of bids way down, and you look into the future, it was Mr. Jacobson's estimate according to the Unger testimony that he was going to be doing $300,000 in 1976, and Armstrong felt it was going to go down significantly after that.

There is another reason, your Honor, and it is the deteriorating relationship, and we are hearing over and over again that this wasn't expressed to Mr. Jacobson at the time of the termination, and we hear that when Moses & Singer's counsel went down to visit with Armstrong's counsel in Lancaster, it wasn't expressed clearly as being one of the reasons for the termination. It sure existed.

And the reason it wasn't expressed was very simply because Armstrong wanted to keep this whole business on a very high level, and it does not do any good to say to somebody "We terminated you because we don't get along with you, and we don't get along with you."

There were reasons which were much more polite. But still I must say I don't think anybody can read those documents attached to the Unger affidavit and conclude that this was just a relationship between two companies that loved each other. I don't think anybody can read Mr. Jacobson's reply affidavit for that matter and read such a conclusion.

Thank you.

MR. LLENHORN: Your Honor, could I have about three minutes in reply. Three or four minutes? Thank you.

Your Honor, firstly with respect to the question of whether you need a conspiracy to show the relation of Sherman Act, Section 1, the answer is emphatically no, and if I may read one sentence of the Supreme Court's decision in Arnold Schwinn "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred, whether by explicit agreement or by silent

combination or understanding with his vendee, is a per se violation of Section 1 of the Sherman Act."

We submit, one, that we have shown a conspiracy. The Sherman Act talks about combinations, agreements or conspiracies. We have shown a conspiracy in the sense that we have shown that it was complaints from Berger, complaints not made in the distant past, but in November of 1975.

THE COURT: Who do you say were conspirators here?

MR. ELLENHORN: If we had to show a conspiracy, the conspirators would be Berger Acoustics and Armstrong, but in point of fact, as I said, we don't -- and we think there was in fact such a conspiracy, and I might say that there was testimony in this record that Berger Acoustic has an extremely intimate relationship with Armstrong, that Armstrong's reps in Philadelphia visit Berger three or four times a week, that they are on the phone with him virtually every day, and that they are close personal friends.

THE COURT: That wouldn't impress me if I were to try the facts. Berger is the authorized representative in the area. I wouldn't draw an inference of conspiracy.

MR. ELLENHORN: No, I wouldn't either but what is strange is that when asked whether in all of those

meetings there was ever any discussion of Jacobson, who is clearly a competitor of Berger, they said, "We don't recall ever once Jacobson's name coming up," and I suggest that is somewhat preposterous on its face.

THE COURT: How do you explain that your client was able to penetrate the Philadelphia market with a number of rather substantial projects there, the federal courthouse the museum as I remember it, a hospital, despite the fact that Berger was the so-called distributor covering that area? Did they prevent the plaintiff from going into the area?

MR. ELLENHORN: No. They made it as difficult as possible.

THE COURT: He did get in anyway.

MR. ELLENHORN: We got in. Those are four or five jobs over three or four years.

THE COURT: If they were engaged in a conspiracy, you would not have gotten their merchandise.

MR. ELLENHORN: They could not make it quite that emphatic without --

THE COURT: They said they prefer that the plaintiff doesn't go in the area but they recognized the right of plaintiff to go in, and plaintiff did go into the area.

MR. ELLENHORN: We went in occasionally and over great resistance.

THE COURT: You did four rather substantial jobs.

MR. ELLENHORN: We do hundreds of jobs every year but the critical point is we can't go into Philadelphia now with Armstrong because we have been terminated.

THE COURT: You can't go anywheres now.

MR. ELLENHORN: That's right. What finally happened in the fall of '75, and I come back to Mr. Wiley's memo, when we went back into Philadelphia in a fairly big way with our supply center and sent 6,000 advertisements into Philadelphia in November, Berger Acoustics complained and sent this memo, our brochure, to their Philadelphia office, and then three months or four months later, we were terminated.

Now, your Honor, with respect to -- and they still haven't explained why in March, why then were we terminated. They say, "We were projecting in two years from now your sales wouldn't be substantial."

Indeed we already had booked with them over a half a million dollars worth of business this year which would place us in the top ranks of their own New York distributors.

An allegation has been made that our area of prime responsibility is larger than the others. That just is not the case.

There is a fellow in Long Island, yes. But there are 15 distributors in New York City who cover the same general area that we do, and in this year of our decline so-called we rank third of those 15. The average Armstrong distributor -- let's just take the New York area. Forget Colorado or Arizona. The average Armstrong distributor in New York City according to the sales records produced at the depositions, does about 275 to 300 thousand dollars a year with Armstrong. We did last year $600,000. We already booked $500,000 for 1976.

Now, twice what the average New York distributor does, and this is in a time when we have been hurt by the decline in construction, and we have had to consolidate our offices to some extent.

Finally, they refer to a job in White Plains, the Texaco job that we secured, which is the largest job we have secured in a long time. It is a huge job. We secured that job by bidding the so-called ATS, integrated ceilings of Armstrong, and Mr. Snyder testified, and I am glad Mr. Wilkinson reminded me of it just now, that that is a system which he conceded there is no competitive

substitute for.

It was very easy for Mr. Snyder at his deposition to reel off and make the self-serving statement that "Well, we have other competitors who can do as well as we can." But our records show that our supply center in 1976 out of every hundred cents on the dollar, 78 cents came from Armstrong products, and our records show that if we had had no Armstrong products available to us over the last two or three years, we would have lost approximately 50 to 60 percent.

THE COURT: How do you answer his argument that yo were ready to do the White Plains job with U.S. Gypsum?

MR. ELLENHORN: What he is referring to is not the basic job, but there was some supplementary tile items that were going to go into the job which we were trying to get a price on and if we didn't get it from them we could get it from some others. There are other sources of some supplies, but the basic integrated ceiling system, the ATS system, is what the architect required. It is what we bid. It is what we got, and it is what gave us an $800,0 job.

We have about six major office buildings coming up in the next 60 days alone that we want to bid on, and it is our understanding that virtually all of these will requi

Armstrong products. I can't categorically state that we may not be able to beg one of those jobs with some other source. I can't go that far.

THE COURT: You say it is your understanding that these jobs will require Armstrong products. Is that something I can go by, your understanding?

MR. ELLENHORN: No. That is the testimony of my client. May I say this, your Honor.

THE COURT: That is a vague kind of setup. I have to deal with facts, you know, on this, especially when are asking for injunctive relief.

MR. ELLENHORN: Your Honor, I request if there is any doubt about this matter, the opportunity -- I perhaps should haverequested it earlier. I didn't understand that was the court's practice -- to call Mr. Jacobson, have him elaborate.

THE COURT: There is no reason why it all could not have gone in the affidavit. I'm not functioning on the basis of a guess and a surmise. There must be some basis for it.

MR. ELLENHORN: There is no question based on the testimony in the record already, the affidavits, the documents that we have submitted that Armstrong is by far our principal source of business, and I don't think the

law requires in order for us to show irreparable injury, that we will instantly vanish or that we have no other conceivable source.

THE COURT: Suppose you get a trial within six months?

MR. ELLENHORN: If we got a trial within six months, that would obviously be far better from our point of view than if we got one in two years. But in six months our supply center would have run out of Armstron materials completely. They will be out in about 30 day . The supply center will be virtually. We will have lost a number of jobs, and more importantly, the word is around the industry already, around the architects, the contractors, the banks and so on, that Jacobson has lost its principal supplier, and of course it raises questions in people's minds was it because of credit, what is the problem and so on.

Now, I can't say to you, yes, if we go to trial in six months and we got a permanent injunction, obviously that would be better than waiting a long time, and we would ask for such an expedited trial in any event, but what I do say, and I think the number of cases have said it, is that the loss of good will of employees -- you have to make plans -- do we keep these people on?

cut back further and so on? The loss of your reputation, the loss of jobs and so on is sufficient to warrant, to constitute irreparable injury.

I don't think we have to show, and we will be literally closed down overnight in order to show irreparable injury, and I notice Mr. Wilkinson in his remarks to the Court didn't even make an effort to show how they will be prejudiced by an injunction. Where will the prejudice be to them if the Court issues an injunction in six months from now? We lose, and our distributorship is terminated at that time. Will they have been prejudiced in the intervening six months? They will have made profits from us. That's what will have happened in the intervening six months. We will have placed orders with them and they will have made money from us. Thank you, your Honor.

THE COURT: Mr. Wilkinson, I do want to ask you the same question I asked your adversary without assuring the trial will be six months because a number of other cases have been pressing here a long time which will take some time to try. Supposing this case did go to trial within a reasonable amount of time. How would you be prejudiced if you continued to supply the plaintiff up to the time of trial? In other words, I am suggesting an accommodation without making a definitive ruling here. Maybe I will make

the ruling. I don't know how I am going to rule, but suppose you did supply the plaintiff until the date of trial and gave you had a fairly prompt trial in this matter. How would you be prejudiced?

MR. WILKINSON: Armstrong put very, very serious consideration into making this move prior to the time that they made the decision to terminate Jacobson.

THE COURT: I understand.

MR. WILKINSON: There were good reasons for doing it, and those reasons constitute the prejudice. They felt that Jacobson wasn't doing Armstrong good, and in fact under these circumstances he was doing it harm.

THE COURT: How was it doing it harm?

MR. WILKINSON: Your Honor, it does not do Armstrong good to have a distributor cover one of its widest territories, and it is not a fact that other contractors in this area cover the same territory. They don't. Jacobson covers the widest territory. To have them doing a very, very poor job insofar as getting business and covering the market places --

THE COURT: How are they doing a poor job as far as getting business is concerned? I don't follow that argument.

MR. WILKINSON: First of all, and maybe the

most important thing --

THE COURT: If there has been a drop in business and you are concerned about that, as I understand it, you appointed no other distributor, what difference does it make? Maybe you have a point in mind. You may express it more clearly so I understand it.

MR. WILKINSON: This really comes into Armstrong's philosophy of having a--

THE COURT: Never mind philosophy now. I suppose every corporation would like to do business its own way, free of any restraints, but we are living under a system of laws that must be respected, and my question to you was assuming that I can give you a fairly prompt trial, how would Armstrong be prejudiced if it serviced the plaintiff during that period of time, and I asked the other side the same question. You tell me how you will be prejudiced is what I am asking you.

MR. WILKINSON: Your Honor, Armstrong appoints a very limited number of contractors in the various areas of the country for a very, very specific reason, and that is because it has to have a working relationship with these people. These people have to go out and bid projects. They have to work with Armstrong and work together with getting a first class ceiling put up in a building.

That's the reason that Armstrong selects its distributors carefully. That's the reason it thinks it has to have a close working relationship with them. When that breaks down, number 1, because of the kinds of letters and gripes and whatever --

THE COURT: That's a personal relationship. That has nothing to do with the product that's put out final by the plaintiff. I don't understand there is any question about the quality of its product, which is what eventually I suppose Armstrong would be interested in.

MR. WILKINSON: My point is that when that relationship breaks down for that reason plus the reason that from a business point of view the sales are declining, and much worse than that the bids are declining, and the contractor refuses to do anything but bid large jobs, that's a relationship that Armstrong just can't live with, and that's the damage.

THE COURT: I don't think you have answered the question. I must say with due respect my question was very specific. We are talking about general terms, and I understand that. My question was if Armstrong was required to accept orders from the plaintiff from now until the date of trial, how would the defendant be prejudiced otherwise than dealing with a customer with

whom it does not have close or friendly personal relation ships from an economic point of view? How would they be injured?

MR. WILKINSON: Your Honor, to be perfectly frank, I can't put that in terms of dollars and cents.

THE COURT: All right.

MR. ELLENHORN: Nothing further, your Honor.

THE COURT: I will take the papers under advise ment.

MR. ELLENHORN: Thank you, your Honor.

THE CLERK: Court stands adjourned.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

JACOBSON & COMPANY, INC.,

Plaintiff,

-against-

ARMSTRONG CORK COMPANY,

Defendant.

- -x

76 Civil 2376

OPINION

MOSES & SINGER, ESQS.
51 West 51st Street
New York, New York

Attorneys for Plaintiff

DAVID H. ELLENHORN, ESQ.
JOSEPH L. FISHMAN, ESQ.
EUGENE I. FARBERG, ESQ.
Of Counsel

DONOVAN LEISURE NEWTON & IRVINE, ESQS.
30 Rockefeller Plaza
New York, New York

JOHN H. WILKINSON, ESQ.
Of Counsel

EDWARD WEINFELD, D. J.

This motion for a preliminary injunction presents the question whether a distributor has been terminated by a manufacturer for legitimate business reasons or in furtherance of a conspiracy or combination in restraint of trade.

The plaintiff, Jacobson & Co. ("Jacobson"), is a contractor in the business of furnishing and installing accoustical ceiling tile and systems, partitions, and other interior assemblies. Jacobson also operates a "Supply Center" in Elizabeth, New Jersey, from which it sells accoustical ceiling tile and other building materials directly to persons and institutions who do their own installation. The defendant, Armstrong Cork Co. ("Armstrong"), is the nation's largest manufacturer of ceiling systems and materials.

In March 1968 Jacobson was designated by defendant as an authorized distributor of its products in New York City, Long Island, Westchester and Rockland Counties (all in New York State), Fairfield County in Connecticut and Northern New Jersey. Plaintiff was one of a number of Armstrong dealers in those areas.(1) The distributorship arrangement did not

(1) In Long Island plaintiff was designated as Armstrong's sole distributor.

restrict plaintiff from selling Armstrong products outside the designated areas. The relationship of the parties continued until March 19, 1976, when Armstrong notified Jacobson that its distributorship was terminated. Soon thereafter, plaintiff brought this action, claiming that the termination violates sections 1 and 2 of the Sherman Act,(2) section 3 of the Clayton Act,(3) and the Robinson-Patman Act.(4)

Plaintiff seeks a preliminary injunction restraining Armstrong from terminating plaintiff as an authorized distributor and compelling Armstrong to continue to sell its products to plaintiff during the pendency of this litigation. Accordingly, the court must decide whether plaintiff has made "a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly" in its favor.(5)

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(2) 15 U.S.C. §§ 1, 2.

(3) 15 U.S.C. § 14.

(4) 15 U.S.C. § 13.

(5) Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 250 (2d Cir. 1973). Accord, Triebwasser & Katz v. American Tel. & Tel. Co., ___ F.2d ___ (2d Cir., May 17,

1. The Merits

The gravamen of Jacobson's charge on this motion is that Armstrong terminated the distributorship because of Jacobson's resistance to Armstrong's unlawful restrictions on the resale of its products in areas outside of those designated in the distributorship agreement. Jacobson grounds its claim on United States v. Arnold Schwinn & Co.,(6) which held that it is per se unlawful "for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."(7) If, as Jacobson contends, Armstrong's purpose to protect its other distributors against competition in their respective designated areas from Jacobson and thereby preserve the integrity of Armstrong's system of territorial distribution contributed substantially(8) to the decision to terminate, then

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Footnote 5 cont'd

1976); San Felippo v. United Brotherhood of Carpenters & Joiners, 525 F.2d 508, 511 (2d Cir. 1975); Dino DeLaurentiis Cinematografica S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966).

(6) 388 U.S. 365 (1967).

(7) Id. at 379.

(8) See Osborn v. Sinclair Ref. Co., 286 F.2d 832, 837 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961); Phillips v. Crown Central Pet. Corp., 395 F. Supp. 735, 769 (D. Md. 1975).

plaintiff ultimately will be entitled to judgment.[9] On the other hand, if the termination was solely for legitimate business purposes such as Jacobson's declining sales volume, its concentration on large jobs that were less profitable to Armstrong, and a deteriorating relationship brought about by Jacobson's many complaints, then Jacobson's claim must fail.[10] As the parties recognize, the question is a factual one.

To support its claim, Jacobson relies upon three aspects of its relationship with Armstrong. First, it cites the circumstances surrounding the establishment of its distributorship and the resistance it later met when attempting to expand its operations in the Philadelphia area, where Armstrong had designated another distributor. While Jacobson concedes that Armstrong acknowledged the plaintiff's right to sell in that area, Jacobson contends that in fact Armstrong's actions belied its acknowledgments. Thus, plaintiff asserts

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(9) Cf. Interphoto Corp. v. Minolta Corp. 295 F. Supp. 711, 721-23 (S.D.N.Y.), aff'd, 417 F.2d 621 (2d Cir. 1969).

(10) The references to facts are drawn from the affidavits and exhibits the parties have submitted. Neither party requested an evidentiary hearing; the inquiry in any case turns not so much on the basic facts but on evaluating the inferences reasonably to be drawn therefrom. See Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204-05 (2d Cir. 1970); SEC v. Frank, 388 F.2d 486, 490-91 (2d Cir. 1968

that when it sought to penetrate the Philadelphia market Armstrong deliberately placed impediments in its way in order to favor Berger Accoustical Company ("Berger"), Armstrong's designated and principal distributor in that area; that Armstrong refused to quote prices or to provide technical assistance from its regional office in Philadelphia whenever plaintiff planned to bid on jobs or sell Armstrong products there; and that Armstrong intended by such inadequate servicing to restrain plaintiff's competitive activity in the Philadelphia area in favor of Berger. While plaintiff does not contend that there is a direct nexus between its attempts to bid jobs in Philadelphia in 1970-1972 and its termination in 1976, it does assert that its difficulties in entering the Philadelphia market because of impediments placed in its way by Armstrong illustrate Armstrong's desire to protect its territorial distribution system and provide a backdrop against which to view later events. Armstrong, on the other hand, insists that it gave Jacobson all the assistance that it requested and points out that many of its local distributors do business outside their areas of primary responsibility.

The second item plaintiff stresses relates to sales of Armstrong products from Jacobson's Supply Center in Elizabeth

New Jersey. Whereas most Armstrong distributors install the products they sell, Jacobson sells from its Supply Center on a "materials only" basis. The institutions that purchase the material can reduce their costs by installing it themselves, and small contractors who otherwise lack access to Armstrong materials can buy them from Jacobson and bid them on small jobs. In the fall of 1975 Jacobson intensified the selling activities of its Supply Center. It sent a flyer to the trade offering Armstrong products at a substantial discount and mailed over 6,000 advertisements to hospitals, schools, accoustical contractors and other potential customers in Pennsylvania, Southern New Jersey and Delaware. Jacobson now asserts, in substance, that Armstrong received complaints from local distributors concerning these sales activities; that Armstrong regarded such activities as a threat to its territorial distribution system; and that Jacobson's termination was in part a reaction to its aggressive Supply Center sales practices. Although Armstrong takes the position that it was unconcerned with Jacobson's Supply Center sales, there is evidence to the contrary. Berger complained to Armstrong about Jacobson's discount sales and its promotional literature, and an interoffice memo by Armstrong's general sales manager with respect to a Jacobson flyer not only takes note of it but

expresses the view that Jacobson's method of doing business would anger other distributors and would create problems for Armstrong. Armstrong contends, however, that its concern was not with the sales per se but with the manner of their promotion. It argues that the Jacobson's advertisements were harmful to its interests in that Jacobson disclosed its confidential price list and tended to disrupt its relationship with its other distributors by giving them a false impression that Armstrong had given Jacobson a special deal on prices.

The third item upon which Jacobson focuses concerns a bid in February 1976 for the installation of ceilings in a federal office building in Atlanta, Georgia. Before submitting its bid Jacobson asked Armstrong for the pricing information and technical data Jacobson needed to determine whether it would bid Armstrong products on the job. Armstrong initally refused to provide the information unless Jacobson committed itself to bidding Armstrong material. Further, an Armstrong sales representative indicated that Armstrong did not want Jacobson bidding on jobs in the Atlanta area since Armstrong already had adequate coverage there from local distributors. Armstrong finally provided the necessary information when Jacobson objected that Armstrong's refusal to assist it was

"anticompetitive." Jacobson won the contract but did not bid Armstrong products. Jacobson was terminated as a distributor three weeks later. Armstrong responds that its reluctance to aid Jacobson in bidding on the contract in Atlanta was not to thwart Jacobson's extraterritorial sales activities; rather, it was based on Jacobson's past history of using Armstrong's price quotations to predict the bids of other Armstrong distributors and to undercut them by bidding competing products. Armstrong emphasizes that it finally did give Jacobson the requested information and that Jacobson in fact did bid competing products and did win the contract for the Atlanta job.

Plaintiff contends that the evidence as to the three items referred to -- Armstrong's discouragement of Jacobson's attempts to do business in Philadelphia, Armstrong's reaction to the sales and promotional activities of the Supply Center, and Armstrong's recent unwillingness to assist Jacobson in bidding the Atlanta job -- justifies the inference that it was terminated for insisting on its right to resell Armstrong products wherever and to whomever it chose.

Armstrong, over and above its denials of wrongful conduct with respect to these specified items, sets forth

business justifications for the termination of Jacobson's distributorship. First, Armstrong stresses that Jacobson's purchases of Armstrong's products dropped from about $1,100,000 in 1973 to about $600,000 in 1975, with prospects of future sales at even lower levels. Moreover, Armstrong contends that Jacobson's jobs in recent years have been primarily large projects upon which Armstrong must offer a price discount, thereby yielding less profit to it. This, combined with Jacobson's cutback in personnel and its abandonment of its branch outlets, indicated poor prospects ahead for Jacobson's sale of Armstrong products. That in fact this was a matter of concern to Armstrong as early as July 1974 and thereafter appears from Armstrong's internal documents; indeed, one Armstrong official recommended Jacobson's termination for these reasons as early as the spring of 75.

The second business reason advanced by defendant for its termination decision was what it terms a "deteriorating relationship" with Jacobson that began in 1974, worsened as time went on, and by 1976 became "intolerable." Documents presented upon this motion suggest that much of the friction between the parties resulted from Jacobson's frequent complaints about Armstrong's products, misinterpretation of specifications

and other matters. Armstrong regarded the complaints as unjustified and mere pretexts by Jacobson to obtain unwarranted allowances.

Jacobson responds to Armstrong's asserted reasons for the termination by noting that its sales volume, though less than it once was, is still relatively large. In 1975 it ranked third among the fifteen authorized Armstrong distributors in the northeast region, with sales more than twice those of the average distributor in its region. Moreover, it notes that other distributors who had similar or even greater declines were not terminated. It stresses that Armstrong never terminated a distributor whose sales approached Jacobson's in volume and that at the time of its termination Jacobson had placed firm orders for Armstrong products in excess of $500,000. As to the alleged "deteriorating relationship" between the parties, Jacobson observes that prior to and at the time of termination no mention was made of this, suggesting that the claim is mere afterthought. Furthermore, it denies its complaints were more frequent than those of other distributors, none of whom have been terminated.

What emerges from this summary of the parties' fact contentions is that the reason for the termination of plaintiff's

distributorship is in sharp dispute. At this juncture it cannot be said that plaintiff has made a compelling case of probable success on the merits; indeed, plaintiff with some understatement acknowledges that "[t]here is, of course, a chance that Armstrong will be able to prove that its refusal to deal with Jacobson resulted from lawful business reasons and not an unlawful act in violation of antitrust laws."

Courts have often recognized, however, that a clear showing of likelihood of success is not a sine quo non for preliminary relief where the balance of hardships tips decidedly in favor of the movant. In such cases the plaintiff need only "'rais[e] questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.'"(11) Measured against this alternative standard, plaintiff has sustained its burden on this application. Whatever ultimately is proved about the extent to which Armstrong hampered Jacobson's attempts to do business in Philadelphia, it is clear at least that Armstrong was adverse to such attempts and would have preferred that Jacobson confine its activities

(11) Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205-06 (2d Cir. 1970), quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

to its designated territory. Also, it is significant that the termination occurred barely one month after Jacobson bid a large job in Atlanta against Armstrong's expressed preference that the job be left to its local contractors. So, too, in light of the substantial volume of Armstrong products that Jacobson continued to sell, it is questionable that it would have been terminated solely because of a decline in sales. Perhaps the "something extra" that proved decisive was the so-called "deteriorating relationship" between the parites. The possibility remains, however, that the major source of friction was Jacobson's aggressive resale policies and its continued insistence upon selling wherever and to whomever it pleased. In short, the reason for Jacobson's termination on the instant record remains a matter of substantial doubt. It is a question that deserves more deliberate inquiry than is possible on this motion, made when the parties have not completed discovery and when all the facts are not before the court.(12)

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(12) Armstrong's contention that the termination, even if motivated by anticompetitive purposes, was mere "unilateral action" that does not satisfy the "contract, combination . . . or conspiracy" requirement of section 1 of the Sherman Act is without merit. That the termination decision was solely that of Armstrong, reached without consultation with third parties, would be of no moment if the termination was part of a general scheme to restrict sales by distributors outside of their assigned territories. Cf. Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968); Quinn v. Mobil Oil Co.,

II. Irreparable Injury and Balance of Hardships

In light of the unresolved questions going to the merits, the equities that support the grant of a preliminary injunction in this case assume particular importance. At the outset, the court rejects the defendant's contention that money damages would make plaintiff whole if ultimately it should prevail. While there appear to be adequate substitutes for many although not all Armstrong products, there is no doubt that Armstrong is the leader in the industry and that its products are often required in architect's specifications. Almost all of Jacobson's major competitors are Armstrong distributors, and Jacobson's purchases from Armstrong far exceed those from other manufacturers. Accordingly, it is likely that Jacobson will be placed at some competitive disadvantage in bidding jobs if Armstrong's refusal to deal with it continues. Whether or not this disadvantage would be as disastrous

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footnote 12 cont'd

375 F.2d 273, 276 (1st Cir.), cert. denied, 398 U.S. 801 (1967). Here plaintiff alleges such a scheme and has presented evidence which it claims supports its charge that the termination was motivated by Armstrong's desire to protect local distributors from competition from Jacobson.

BEST COPY AVAILABLE

as Jacobson contends, it is an injury that is difficult of precise calculation in dollars and cents, and this is a factor traditionally relied upon to support injunctive relief.[13] Moreover, Jacobson's advertisements for its Supply Center stress that it is a full service supplier, with access to the material of all leading manufacturers. Almost 80% of the sales from Jacobson's Supply Center in 1976 have been of Armstrong products. Jacobson's loss of this major line would jeopardize plaintiff's good will and its position as a full line, full service supplier, and the risk that its customers will turn to competitors who do have access to Armstrong as well as other products is substantial and could result in immeasurable harm.[14] Whatever the hardship to plaintiff, it heavily outweighs any supposed inconvenience that defendant will suffer when the injunction issues. Defendant concedes that it will not encounter any financial loss by continuing to deal with the plaintiff. Understandably it is reluctant

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(13) See, e.g., Interphoto Corp. v. Minolta Corp., 417 F.2d 621, 622 (2d Cir. 1969), aff'g 295 F. Supp. 711 (S.D.N.Y. 1969); Bergen Drug Co. V. Parke, Davis & Co., 307 F.2d 725, 728 (3d Cir. 1962).

(14) Cf. Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 723-24 (S.D.N.Y.), aff'd, 417 F.2d 621 (2d Cir. 1969); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 728 (3d Cir. 1962); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743, 749-50 (E.D. Pa. 1964).

to do so, but that the parties' relationship may be strained does not foreclose relief. Moreover, this is an insubstantial matter, since defendant has agreed, despite the termination notice, to sell plaintiff material so that it can fulfill contracts that were outstanding at the termination date. Thus, there will be, in any event, a business relationship between them that will continue for some time. The court's usual reluctance to issue a mandatory injunction disappears in the absence of any real harm to the defendant and the need to restore the status quo pending final resolution of the difficult issues that have been raised.

Since plaintiff has made a clear showing of sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships that tips decidedly in its favor, the motion for a preliminary injunction compelling Armstrong to continue to sell products to it is granted. It is hardly necessary to add that the granting of this relief is no indication of the court's view of the merits of the controversy, the resolution of which must await a trial.(15)

(15) See, e.g., Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 73 742 (2d Cir. 1953); Missouri-Kansas-Texas R.R. v. Randolph, 182 F.2d 996, 1000 (8th Cir. 1950); United States v. Pennzoil

Submit order on consent.

Dated: New York, New York
July 2, 1976

/s/ Edward Weinfeld
United States District Judge

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footnote 15 cont'd

Co., 252 F. Supp. 962, 987 (W.D. Pa. 1965).

Affidavit of David N. Ellenhorn, Sworn to July 9, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACOBSON & COMPANY, INC.,

Plaintiff,

- against -

ARMSTRONG CORK COMPANY,

Defendant.

76 Civ. 2376 (EW)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID N. ELLENHORN, being duly sworn deposes and says:

1. I am a member of the Bar of this Court and of Moses & Singer, attorneys for plaintiff. I submit this affidavit in support of plaintiff's proposed order on its motion for a preliminary injunction and in opposition to defendant's proposed order.

2. Defendant's proposed order contains a stay of the preliminary injunction pending an appeal by defendant to the Court of Appeals for the Second Circuit. We respectfully submit that such a stay would be inconsistent with Your Honor's opinion, which recognized that plaintiff will suffer irreparable injury without a preliminary injunction and that issuance of the injunction will cause no injury to defendant. A stay thus would, "be tantamount to deciding that the interlocutory injunction was improperly granted." 7 Moore's Federal Practice ¶6205 at p. 62-26. Defendant's request for a stay should therefore be denied.

3. Defendant's proposed order also includes a provision directing that the trial of the action, "be held within

six months of the date of this order, or as soon as possible thereafter as is consistent with the Calendar of the Court." We believe that this provision should not be included in the order. As Your Honor is aware, plaintiff has vigorously and expeditiously pursued this case. The action was started with a request by plaintiff, which was granted by Your Honor, for expedited discovery. Plaintiff thereafter examined three of defendant's executives and obtained production of a large number of documents. After the hearing on plaintiff's motion for a preliminary injunction, plaintiff continued to press forward and, on July 2, 1976, plaintiff took the deposition of Paul Langan, a former employee of defendant who had partial responsibility for plaintiff's account. Plaintiff has also served a subpoena duces tecum on Berger Acoustical, Inc., and is in the process of making arrangements to examine that firm as a witness. In contrast, the defendant has sought no discovery whatsoever during the six weeks in which this action has been pending.

4. In this circumstances, it is surprising that defendant should now request that the Court order a final trial of the action within a short and specified time period. While plaintiff shares defendant's desire for a prompt trial, we believe it would be inappropriate to include a provision in the Court's order of the kind proposed by defendant in view of the fact that plaintiff has moved so expeditiously. If plaintiff does not continue to do so, defendant can of course move for appropriate relief at that time.

5. For the foregoing reasons, it is respectfully requested that Your Honor issue the order in the form proposed by plaintiff and not in the form proposed by defendant.

David N. Ellenhorn

Sworn to before me this 9th day of July, 1976.

NOTARY PUBLIC
EUGENE FARBER
NOTARY PUBLIC, State of New York
No. 31-4517540
Qualified in New York County
Commission Expires March 30, 1978

Affidavit of James R. Withrow, Jr., Sworn to July 12, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

557 a

- -x

JACOBSON & COMPANY, INC., :

Plaintiff, : 76 Civ. 2376 (EW)

-against- : AFFIDAVIT

ARMSTRONG CORK COMPANY, :

Defendant. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES R. WITHROW, JR., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the law firm of Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, New York 10020, counsel to defendant Armstrong Cork Company in the above-captioned action.

2. Counsel for plaintiff Jacobson & Company, Inc. ("Jacobson") and defendant Armstrong Cork Company ("Armstrong") have each shown to the other its proposed form of order and have spoken on the phone and met on July 9, 1976 to try to resolve the differences between their differing forms of order. Counsel have reached agreement as to the provisions that were in conflict, except for those suggested by defendant providing for a stay pending an expedited appeal and for trial on the merits in six months time. Accordingly, I submit separately herewith for the Court's consideration defendant's proposed order, a copy of which is annexed. The order we are submitting differs from

plaintiff's proposed order only in its last two paragraphs, which provide for such a stay and for trial on the merits in six months.

3. The order Armstrong proposes includes a provision for a stay pending appeal, provided that Armstrong makes prompt application to the Court of Appeals for an expedited appeal. We respectfully submit that there are substantial grounds for an appeal on the merits as to the want of an adequate showing both of unlawful conduct by Armstrong and the need for an injunction pendente lite. We will appeal expeditiously from this Court's order of a temporary injunction, and we will promptly file a motion for an expedited appeal. Such a motion has in fact already been drafted, and a copy thereof was sent on July 8, 1976 to counsel for Jacobson along with our preliminary draft of the order to be submitted on this Court's opinion of July 2, 1976. The proposed motion for an expedited appeal provides for Armstrong's brief to be filed on July 27, 1976, a little over two weeks from now, for Jacobson's brief to be filed on August 12, 1976, and for argument to be heard during the week of August 16, 1976, the only week in August when the Court of Appeals will sit. This application is consistent with the Court of Appeal's stated practice, Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969), to grant a preference to appeals from orders granting or denying a temporary injunction.

The requirement that Armstrong resume doing business with Jacobson will be both onerous and disruptive for the reasons set forth in the papers submitted to the Court by Armstrong in opposition to the motion for a temporary injunction. On the other hand, we respectfully submit that Jacobson will not be prejudiced by the brief stay sought for the period of such a highly expedited appeal. Prior to the filing of this action, Armstrong agreed to fill orders for Jacobson's then existing

commitments prior to his termination as an Armstrong contractor, and the availability of comparable ceiling systems products from other manufacturers can clearly permit Jacobson to pursue its business interests during the brief period which will be required for an expedited appeal. Indeed, we have just been informed by Armstrong of its recent discovery that, since its termination, Jacobson has been acquiring Armstrong products through a local Armstrong contractor. Moreover, the five week period between the entry of this Court's order and the week in which argument will be sought is substantially less than the nine weeks between Jacobson's termination and the time this action was filed and a temporary injunction applied for. Of course, should Jacobson find in the future that the existence of the stay is in fact causing it significant difficulty in its business activities, it is always at liberty to apply for dissolution of the stay.

4. The last paragraph of defendant's proposed form of order provides for a trial on the merits of plaintiff's action within six months. In view of the serious damage that we contend Armstrong will suffer until the matter is resolved on its merits, and in view of plaintiff's allegations of injury on its motion for a temporary injunction, we believe that this action warrants a prompt trial on the merits. The six month period we have chosen comports with Your Honor's suggestion during oral argument of plaintiff's motion for preliminary relief, that a trial within six months or some other reasonably short period consistent with the press of this Court's other business would minimize any damage to either side, whether the temporary injunction be granted or denied (Transcript, pp. 58-60).

Moreover, although counsel for plaintiff refuses now to consent to a trial within six months, it is noteworthy that on oral argument of plaintiff's motion he said "[i]f the injunction is issued, we are willing to enter into any kind of stipulation for an expedited trial. . .that is reasonable" and specifically went on to mention the time periods of three months and six months (Transcript, p. 24). In addition, since our request for a six month trial is independent of our request for a stay and our plans to seek an expedited appeal, if we obtained a reversal of the Court's decision granting preliminary relief, a prompt trial would certainly be in plaintiff's interest as well.

WHEREFORE, it is respectfully submitted that the Court adopt defendant's proposed form of Order.

/s/ James R. Withrow, Jr.
James R. Withrow, Jr.

Sworn to before me this
12th day of July, 1976.

/s/ Rose H. Suelt
Notary Public

Attachment to Affidavit of James R. Withrow, Jr.

Proposed Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

561 a

- -x

JACOBSON & COMPANY, INC.,

Plaintiff,

-against-

ARMSTRONG CORK COMPANY,

Defendant.

- -x

76 Civ. 2376 (EW)

ORDER

IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction is hereby granted and that, upon the filing by plaintiff with the Clerk of a bond in the sum of $10,000 with good and sufficient surety, the defendant, its agents, servants, and employees are directed to sell to plaintiff defendant's ceiling systems products on such terms, conditions and prices, and with the same services, as regularly provided to Armstrong ceiling systems contractors, pending resolution of the merits of this action upon trial;

IT IS FURTHER ORDERED that:

(a) plaintiff shall promptly confirm in writing to defendant's Saddlebrook, New Jersey office all orders for jobs awarded to plaintiff for its installation, which writing shall state the job name and location, material and footage or units, approximate shipment date, and any off-list or special price granted by defendant; and

(b) plaintiff shall promptly confirm in writing to defendant's Saddlebrook, New Jersey office all its orders for plaintiff's warehouse, which writing shall state material and footage or units and each such order shall be shipped by defendant within the times specified in defendant's then current published shipping estimates applicable to all Armstrong ceiling systems contractors, or as soon thereafter as the stated material and footage is commercially available;

IT IS FURTHER ORDERED that the foregoing provisions of this order be, and they hereby are, stayed pending appeal therefrom by defendant, provided that defendant promptly file an application in the United States Court of Appeals for the Second Circuit for an expedited appeal to be hear the week of August 16, 1976; and

IT IS FURTHER ORDERED that trial of the merits of this action be held within six months of the date of this order, or as soon as possible thereafter as is consistent with the calendar of the Court.

Dated: New York, New York
July , 1976

U. S. D. J.

Order of Weinfeld, J., Dated July 12, 1976, Granting Plaintiff's Motion for a Preliminary Injunction

Filed
U.S. DISTRICT COURT
JUL 13 4⁵⁹ PM '76
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JACOBSON & COMPANY, INC.,	:	
Plaintiff,	:	76 Civ. 2376 (EW)
- against -	:	
ARMSTRONG CORK COMPANY,	:	ORDER
Defendant.	:	

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(b) plaintiff shall promptly confirm in writing to defendant's Saddlebrook, New Jersey office

all its orders for plaintiff's warehouse, which writing shall state material and footage or units and each such order shall be shipped by defendant within the times specified in defendant's then current published shipping estimate applicable to all Armstrong ceiling systems contractors, or as soon thereafter as the stated material and footage is commercially available.

Dated: New York, New York
July 2, 1976

Edward Weinfeld
U. S. D. J.

Received 3 copies
of Joint Appendix, 2 volumes.
5/9/76 10:30 A.M.